

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 7258

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IN THE

**United States Court of Appeals for the
District of Columbia**

APRIL TERM, 1938

SPECIAL CALENDAR

357

**INTERNATIONAL ASSOCIATION OF MACHINISTS,
TOOL AND DIE MAKERS LODGE No. 35, ET AL.,
PETITIONERS,**

vs.

**NATIONAL LABOR RELATIONS BOARD,
RESPONDENTS.**

**PETITION TO REVIEW AND SET ASIDE ORDER OF NATIONAL LABOR
RELATIONS BOARD.**

BRIEF FOR PETITIONERS.

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IN THE
**United States Court of Appeals for the
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APRIL TERM, 1938

SPECIAL CALENDAR.

INTERNATIONAL ASSOCIATION OF MACHINISTS,
TOOL AND DIE MAKERS LODGE No. 35, AFFILIATED
WITH THE INTERNATIONAL ASSOCIATION OF MACHINISTS, AND
PRODUCTION LODGE No. 1200, AFFILIATED WITH THE
INTERNATIONAL ASSOCIATION OF MACHINISTS, PETITIONERS,

vs.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENTS.

PETITION TO REVIEW AND SET ASIDE ORDER OF NATIONAL LABOR
RELATIONS BOARD.

BRIEF FOR PETITIONERS.

Jurisdiction.

The jurisdiction of the Court rests upon Section 10 (f) of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*), hereafter referred to as the Act. The Board's decision, including its

findings of fact, conclusions of law, and order, is set forth at pages 667 to 702 of the record.

Statement of Facts.

This case arises over a contest for membership between petitioners herein, labor organizations affiliated with the International Association of Machinists, (hereinafter called the I. A. M.) and the American Federation of Labor, and the United Automobile Workers of America, (hereinafter called the U. A. W.) a labor organization affiliated with the Congress for Industrial Organizations, in the production and tool room departments of the Serrick Corporation, of Muncie, Ind.

The Serrick Corporation is engaged in the manufacture of bolts and screws, automobile mouldings, refrigerator parts and stenotype machines. It does a large interstate business and has an annual payroll of over a million dollars.

The Company, as other similar plants, maintains a tool room in which it employs some sixty-three machinists, whose duty it is to make and repair the tools and dies used in the production department of the plant. These tool room workers are highly skilled and receive a compensation considerably in excess of that paid the production workers. Their trade has long been recognized as a well defined craft. The tool room is in the center of the production department, separated from it by a wire fence.

During the summer of 1937, the United Automobile Workers of America, had been conducting a campaign of organization among production employees in the Serrick plant. On July 25, of that summer, several employees in the tool room conducted a straw-poll at which it was determined that approximately 80% of the tool room employees favored the American Federation of Labor union over the U. A. W. Thereupon these employees contacted Mr. C. F. McDonald, who is a Grand Lodge Representative of the International

Association of Machinists, and requested him to organize the tool room employees. In response to this request, Mr. McDonald called a meeting of the tool room employees on July 28th and at that meeting 34 employees joined the I. A. M. and formed the Tool and Die Makers Lodge No. 35, a petitioner herein. Immediately thereafter considerable electioneering activities took place among the tool room employees—both by those who had joined the I. A. M. and those who had joined the U. A. W. The U. A. W. claims and petitioners deny that the company assisted the petitioners. On August 3, Mr. McDonald approached the company manager in regard to signing a one year closed shop contract covering the tool room employees. The management, after having investigated the question, determined that the I. A. M. represented a majority of employees in the tool room. After several days of arguing over the terms of the contract, the parties (with the exception of the president who was in New York) finally agreed upon certain terms. On August 6th the president wired his acceptance of the contract, except that he insisted on a maximum of forty-four instead of forty hours. At a meeting held that evening the tool room local accepted the president's proposition in regard to hours. When the president returned from New York on the 11th of August, the contract was officially signed, but was dated the 6th. On August 13, eighteen tool room employees were discharged, as they had refused to join the I. A. M. according to the terms of the contract.

After this contract was made the I. A. M. started organizing the production workers into a separate Production Lodge #1200. This organization of production workers into a separate local was done in accordance with the I. A. M.'s constitution, which provides for separate locals for non-skilled production employees, who work on machines. By October a considerable number of employees in

the production department had been enrolled into Production Lodge #1200.

Upon charges being filed by the U. A. W. with the National Labor Relations Board, a complaint was issued on October 5, 1937 against the Serrick Corporation, which alleged that the Serrick Company had discriminatorily discharged seventeen production workers and 18 tool room employees because of their membership in the U. A. W.; that it had maintained a company union; that it had refused to bargain with the U. A. W., who claimed it represented a majority of the production workers; and that it had by various acts of coercion and interference attempted to discourage membership in the U. A. W. and encouraged membership in the I. A. M. The Company in its answer denied the charges, and alleged affirmatively in respect to the discharged tool room employees, that it had previously entered into a closed shop contract with the I. A. M. covering all tool room employees. Prior to this complaint the U. A. W. had filed a petition for certification under Section 9(c) of the Act in which it claimed to represent a majority of the production workers, exclusive of tool room employees. On September 27th this petition was amended to include tool room employees. The petition and complaint were consolidated for the purposes of hearing, and the I. A. M. intervened in the joint cases on October 12th. A lengthy hearing, lasting from October 18th through November 18th, was conducted by a Trial Examiner appointed by the Board. All parties participated in this hearing. The Trial Examiner filed his Intermediate Report on March 4, 1938. He found, among other things, that the Company had interfered with the organization of production workers by the U. A. W.; that the closed shop contract covering the tool room employees with the I. A. M. was valid and binding, having been entered into at a time when I. A. M. represented an uncoerced majority of tool room employees; that the Com-

pany had not assisted the I. A. M. in reaching this majority ; that tool room employees constituted an appropriate bargaining Unit.

The U. A. W. filed exceptions to this report. On July 27th, 1938 the Board handed down its decision, which substantiated for the most part the exceptions filed by the U. A. W. In this decision the Board found that the I. A. M.'s closed shop contract had been made with a labor organization assisted by unfair labor practices, and that the I. A. M. did not represent an uncoerced majority of employees in the tool room at the time of the execution of the contract, the membership of the I. A. M. having been assisted by activities of employers' minor supervisory employees. The contract was accordingly held unlawful and the Company was ordered to refrain from giving effect to it. The Board further found that the tool room did not constitute an appropriate unit, but that the appropriate unit consisted of all production employees of the Serrick Corporation, including those employees employed in the tool room. The Board certified the U. A. W. as the exclusive bargaining agent for all of the production and tool room employees of the Serrick Corporation. This was done in spite of the fact that prior to the issuance of the decision the I. A. M. had formally notified the Board that there had been a change in representation among the employees and that the I. A. M. now represented a majority of the production workers as well as the majority of the tool room, and in spite of the fact that an election to determine this question was requested and in fact had been expected by all parties.

Issues.

The principal questions presented under the above statement of facts are these :

1. Did the Board err in finding that the I. A. M. did not represent an uncoerced majority in the tool room on either

August 6th or August 11th and that the I. A. M. had been assisted by the employer in obtaining its majority, and that, therefore, the contract of August 6th was invalid?

2. Did the Board err in holding that the tool room employees did not constitute an appropriate unit for collective bargaining, or in refusing to hold an election to ascertain the choice of the tool and die makers in this respect?

3. Did the Board err in ordering the employer to deal exclusively with the U. A. W. as representative of all production workers, ignoring the claims of the I. A. M. that it represented a majority in the production department and refusing to conduct an election?

Summary of Argument.

I. The record is clear that there were no employer activities of any kind, coercive or otherwise, operating in any way to assist the International Association of Machinists in acquiring membership prior to the 28th of July. Since at that time the I. A. M. had obtained an uncoerced majority, any subsequent activities on the part of the employer are either irrelevant or are permissive under the Act. Such activities tend to further the object of the Act to attain peaceful industrial relations.

II. The record fails to disclose any evidence of any activity either by the employer or attributable to the employer occurring subsequent to the 28th, operating to assist the I. A. M. The Board attempts to attribute electioneering and solicitation activities of what it calls "minor supervisory" employees to the employer. These employees were in no sense "supervisors" and they were members and officers of the I. A. M. and eligible to membership in either union. Even if they could be termed "supervisory employees", nevertheless their conduct and actions were in no way coercive. The Board further overlooks the im-

portant fact that electioneering activities were carried on in the tool room by both of the rival organizations, during company time, and on company property, and no privilege was granted or accorded to the I. A. M. which was denied to the U. A. W. Finally, the great majority of the so-called electioneering activities and solicitations which the Board complained about took place subsequent to the time when a valid closed shop contract had been entered into between the company and the I. A. M. and are accordingly entirely permissive.

III. Even assuming that the practices which the company is alleged to have engaged in did take place, they are contrary to no declared purpose of the Act. The Board in the present case has ignored the realities of rival organizational activities and has attempted to foster a spirit of enmity rather than cooperation between the employer and his employees. Under the Act the Board must find actual coercion and in so doing must regard the realities of the situation before it. Here two national organizations were contending, against whom no charges of employer domination could be brought and the "minor supervisors" were members of and acting solely on behalf of their respective organizations.

IV. The tool room employees constitute at least a prima facie appropriate bargaining unit under the Act. In such case the Board should have either designated the tool room as a unit or else applied its own "Globe Doctrine" and permitted the employees in the unit to decide for themselves whether they wished to be bargained for on a craft or industrial basis. The Board's two stated reasons for refusing to designate the tool room unit are erroneous and illogical and entirely contrary to the practice of the Board and the policy of the Act. Under these reasons the Board establishes the rule that unfair practices of an employer

can change a previously appropriate unit and that national labor organizations cannot adopt their own methods of organizing.

V. Since prior to the decision the Board was formally notified of the fact that the employees in the production department had shifted their affiliation and a great majority had joined the I. A. M., it should not have ordered the employer to bargain exclusively with the U. A. W. which at the time of the order did not represent a majority. Insofar as the change of representation is the result of the free exercise of choice on the part of the employees the Board has no power to order a return to the *status quo*. If the circumstances of the change are controverted a hearing should be held before the Board proceeds to order the employer to bargain exclusively with a union representing only a small minority of the employees.

ARGUMENT.

I.

THE I. A. M. HAD OBTAINED AN UNCOERCED MAJORITY ON JULY 28. EMPLOYER ACTIVITIES SUBSEQUENT TO THAT TIME ASSISTING I. A. M. PERMISSIBLE.

The Board has invalidated a contract between the International Association of Machinists, Tool and Die Makers Local No. 35, and the Serrick Corporation, covering the tool room employees at the Serrick plant, for the claimed reason that the I. A. M. had been assisted in obtaining the contract by unfair practices of the employer, who had discouraged membership in the U. A. W. and encouraged membership in the I. A. M. Petitioners deny completely that there existed any such practices or that the I. A. M. was assisted

by any means contrary to the Act, either prior or subsequent to the making of the contract on Aug. 6th. However, for the purpose of petitioners' first argument, it can be assumed that the Board was correct in its finding of employer assistance, after July 28th. Consequently, if the Court agrees with the following argument, all the remaining issues in the case will at once be disposed of.

Petitioners' first argument is briefly as follows: There is no evidence in the record whatsoever that there were any unfair practices of any kind on the part of the employer prior to the time that the I. A. M. had obtained a majority membership on July 28, 1937. It follows that any course of activities on the part of the employer subsequent to the time of obtaining a lawful majority would, first, be irrelevant, and second, would be permissible, provided that such activities did not operate to enable the I. A. M. to retain that majority. It is not the fact that any so-called unfair practices operated to enable the I. A. M. to retain its majority, there is no evidence to give rise to any such inference, and most important the Board made no such finding.

A. There Were no Unfair Practices Prior to the 28th.

It can hardly be argued that there were any practices on the part of the employer prior to July 28th which coerced any tool room employees into joining the I. A. M. or which operated to assist the I. A. M. in obtaining membership. In the first place the evidence is unrefuted that the I. A. M. had not even attempted to organize the workers in the tool and die room prior to July 28th. Likewise, the evidence is clear that there had been no contact with anyone employed at the plant prior to the day before the meeting at Muncie, Indiana. That meeting was the first appearance of any I. A. M. representative in the city and the first contact it had with the employees. Consequently, nothing said or done by the employer prior to that time could operate to deprive

the I. A. M. of the results of its organizational efforts and of its subsequent contract. To say otherwise—to say for instance that the I. A. M. was assisted and therefore barred because the company had during the preceding two months endeavored to keep the U. A. W. out of the plant—would be to deny a labor organization the right to attempt to organize in a plant where another and competing labor organization had been discriminated against or combatted but where it was not anticipated or expected that a second organization would appear. No Company representative anticipated or had any knowledge that the I. A. M. would attempt to organize prior to July 28th.

From the record and the Board's decision it is clear that the first contact the I. A. M. had with the plant was when Birod, an employee in the tool room, contacted Mr. C. F. McDonald, a grand lodge representative, who Birod discovered was in town on a different matter. This was a day prior to the 28th, on which day the meeting was held. A few days prior to that time two tool room employees, Birod and Arthur Becker, together with Walter Fouts and Cecil Shock, also tool room employees but whom the Board terms supervisory employees, (of which more later) discussed the possibility of joining an American Federation of Labor union. To ascertain the sentiment of the tool room employees Birod took a straw vote of the tool room employees by personally contacting all of them and asking whether they would like to join a C. I. O. or American Federation of Labor union.¹ Upon ascertaining that 80% favored the American Federation of Labor, Mr. McDonald was contacted and a meeting called for the next day. At that meeting, held in a city meeting hall hired by the union for the purpose which was attended by some 35 to 40 tool

¹ The Board states in its decision that Birod did not question the employees on all three shifts. The record is undisputed that Birod contacted each and every employee on each and every shift. See R. 397, 425.

room employees, 34 voluntarily signed membership cards in the I. A. M. The signatures were procured, neither on Company time nor on Company property. There is absolutely nothing in the record which indicates that the efforts to affiliate with a national organization were prompted by anything other than the desire of the tool room employees themselves, or further that the signatures of the 34 employees were procured by any coercive activities on the part of the employer whatsoever. In fact the circumstances clearly indicate that it was solely because of the desire of the men themselves that the organization was formed.

The Board makes much of the fact that Walter Fouts and Cecil Shock were supervisory employees. It will be explained in a later portion of this brief precisely what the positions of these two men were, and it will be seen that they were not supervisory employees in any real sense of the term, had no power to hire or fire, and had no higher position than any other of the tool room employees, but were merely older, more experienced, men. However, even though these employees may have had a limited direction of the work and may in the absence of the foreman or assistant foreman have been looked up to as "bosses" by certain of the tool room employees, nevertheless, these men were both eligible to membership in either of the two competing labor organizations and in fact became members of one of them. As such they were entitled to the benefits of the Act and were entitled to "join or assist in the formation" of a union of their own choosing, under Section 7 of the Wagner Act. There is absolutely nothing in the record to indicate that the desire of these two men, who it must be remembered were first approached by two "ordinary employees", to join a labor organization, was instilled by the employer, and most conclusively there is absolutely nothing in the record to show that these men

used their so-called "supervisory" positions to force or coerce any of the 34 employees into signing upon the night of the 28th at the meeting called by Mr. McDonald.

The Board refers to one isolated instance, in which Wayne Shimer, night superintendent, was said to have told a tool room employee that "Mr. Serrick would recognize an American Federation of Labor union but he would not recognize a C. I. O. union". Shimer vehemently denied making any such statement, pointing out that he did not even know Mr. Serrick, the president of the company, at that time (R. 333). The date when this allegedly took place was given as no more definite a time than "about July 26th". Very possibly it might have occurred a few days later. In fact if any statement was made, it must have been later because prior to the 26th McDonald had not been contacted, the I. A. M. had no idea of organizing in the plant, and certainly neither the president nor any one else knew that there would be any attempt to organize in the plant. There is nothing to show that this remark, if it was made, was generally known or was circulated throughout the plant or that it operated to coerce any one. The man to whom it was made joined the C. I. O.

Assuming this conversation took place, still this one isolated instance should not operate to deprive the I. A. M. of its bargaining rights. If it could so operate, a very simple way has been discovered for an employer to defeat any organization that might later come into his plant, by merely making some remark in the union's favor. Such an organization would then have been assisted, even though the assistance was unasked for, unwanted, and even unknown. The above instance is the sole one prior to the 28th which the Board can point to as being in any way an "assisting" act, on the part of the employer.

B. Once a Majority Has Been Lawfully Acquired, the Purposes of the Act Are Furthered Rather Than Violated by Subsequent Employer Assistance.

Since the I. A. M. had secured its majority of 34 employees free from any acts of coercion, assistance, or favoritism on the part of the employer, it follows that the employer can subsequently assist that majority organization to achieve an even larger majority prior to entering into a closed shop contract—so long as the employer influence is not used to maintain the majority or so long as no acts of discrimination in regard to hire or tenure of employment take place, which is not the case here. None of the subsequent acts of the employees, imputed to the employer, and termed coercive, was discriminatory. It was not intended under the Act to outlaw employer assistance once a majority is obtained.

The Act manifestly contemplates that an employer may encourage his employees to join the union that the majority of the employees have already designated as their representative. The Act expressly states that once even a bare majority has been reached the employer can immediately enter into a closed shop agreement with the duly chosen representative of such employees (Sec. 8(3)), forcing it upon those employees who have been opposed to the winning union and who might still like an opportunity to consider the matter. Those not joining can immediately be discharged. If such action, which in truth is arbitrary and compulsory, is sanctioned by the Act, can it not be argued that the same Act allows for a more considerate, more reasonable and more diplomatic approach? May not the employer seek to achieve harmony in his plant by first inducing all of his employees to become members of the majority organization before entering into the closed shop contract? May he not co-operate with the union already

bargaining for a majority of his employees, at least to the extent of facilitating that union's efforts to persuade the remaining employees to join up with it? Is this effort to enter into an agreement by methods of peaceful persuasion to be outlawed? Is compulsion preferable to persuasion?

We are not suggesting that an employer can insulate the operation of section 8 by simply recognizing a lawful majority. He may not discharge an employee for not joining the union he desires, and he may not adopt measures amounting to discrimination so as to coerce the employees to join the majority organization until the closed shop agreement has been entered into. But surely he may peacefully promote the union of the majority so that when he does enter into the closed shop contract there will be greater unanimity among his employees. The argument that the employer may not do so even after a majority has selected a union as its bargaining agent, because the guarantee to employees of the freedom to choose those representatives involves the liberty to change representatives is absurd under the circumstances of this case. Once a bargaining agency has been selected it and the employer may restrict the "liberty to change representatives" for a long while. Certainly under the Board's own rule for a year at least, for the Board usually refuses to require an employer to recognize a change in representatives within a year; and certainly the right to enter into a closed shop contract itself is a restriction on the liberty to change representatives. Here again the Board resorts to strained construction not warranted by the Act in order to prevent normal activities conducive to peaceful relations. It forgets that activities carried on after a majority has been reached, in an effort to peaceably persuade the employees to join the union chosen by the majority, are undertaken upon a different stage or background, and the permissible area of employer influence is necessarily extended.

Assuming as true the practices of the Serrick Company which the Board claims were indulged in, are they not far preferable to another course of action which might have been adopted—that of immediately signing a closed shop contract on July 28th and discharging all the U. A. W. sympathizers who did not want to become members of the majority organization? Any realistic approach to the problem would insist on the grant of the right to do what the employer in this instance did, assuming the facts to be as the Board has construed them.

It is submitted that even assuming the conduct here alleged did amount to favoritism, did amount to preference, did evidence co-operation given to the I. A. M. and denied to the U. A. W., nevertheless such practices do not and cannot constitute a violation of the Act, coming as they did, after a majority had been achieved. There is no other answer if the purpose of the framers of the act—to foster group unionization in order that industrial strife may be obviated—is given due consideration.

II.

THE RECORD IS BARREN OF ANY EVIDENCE THAT THE EMPLOYER ENGAGED IN ANY COERCIVE OR OTHER PRACTICES OPERATING TO ASSIST THE I. A. M. WHICH ARE CONTRARY TO THE ACT.

The Board held that “The I. A. M. contract was the culmination of a design on the part of the respondent to select the I. A. M. as the exclusive representative of the employees in the tool room as a means of destroying the U. A. W. which it opposed”.

It is submitted that the record is entirely lacking in any substantial or reasonable evidence to support such a conclusion.

On the contrary the evidence shows that the formation of the I. A. M. local and the obtaining of the contract was solely the results of the desires and efforts of a number of tool room employees. How can it possibly be said, with any degree of reason, that Local 35 was sponsored and selected by the employer? The Board found such evidence in the fact that, following the formation of the Local and the signing up of a majority of the tool room employees, electioneering activities were carried on during company time and assertedly by so-called "supervisory employees". In making such findings, which resulted in the abrogation of the I. A. M. contract and the disruption of peaceful relations in the plant, the Board forgets three important factors: *first*, that the so-called "supervisory employees" exerted no influence or control over their fellow employees and their utterances were in no way or manner coercive and were not attributable to the employer; *second*, that electioneering activities were carried on during company time by both of the organizations in the plant, and no privilege was granted or accorded to the I. A. M. which was denied the U. A. W., and *third*, that the great majority of the so-called electioneering activities and solicitations complained about occurred *subsequent* to the 6th of August at which time the closed shop contract had been entered into.

Even a very casual reading of the record will disclose, as an undisputed fact, that the company had nothing whatsoever to do with the appearance of the I. A. M. at the plant or with the formation of the I. A. M. Local. The facts in this respect have been stated under our argument I.

There is no evidence whatsoever controverting the fact that the organization of the workers into Local 35 was the result of their own free desire and wish—that this was their free wish is reflected in the straw vote taken of all three shifts, when it was discovered that 80% of the employees desired to affiliate with the American Federation of Labor.

There is no attempt to contradict this testimony, and, as this straw ballot was taken prior to the time when there was any rival activities whatsoever, it is not possible to say that the company's activities had caused the result of the poll.

A. The So-called "Supervisory Employees" Exerted no Influence or Control Over Their Fellow Employees and their Utterances Were in no Way or Manner Coercive and Were not Attributable to the Employer.

1. Fouts, Shock, Bolander and Dininger Are Not "Supervisory Employees" in Any Actual Sense so as to Make Their Actions Attributable to the Employer.

To return to the first of the three important omissions in the Board's findings. The Board stated explicitly that the I. A. M. was assisted by a "corps" of the company's supervisory employees. A more unfair or more misleading statement than this would be difficult to imagine. To begin with the record is undisputed that there were only *two* supervisory employees in the tool room which included 63 employees—McCoy, who was the foreman, and Dominick, assistant foreman. (See Respondent's Exhibit #7, R. 509.)

Further, it is of great significance that the stipulation entered into by all of the parties, listing the eligible employees in the tool room *expressly excludes* "foreman, office employees, and other supervisory employees", but that, although the names of McCoy and Dominick are omitted, the names of the four employees whom the Board now claims to be the soliciting "supervisory employees" are expressly included in the list (R. 483).

These men, termed "supervisory employees", whom the Board alleged constituted the "corps" soliciting membership in the I. A. M. included solely Fouts and Dininger. Bolander and Shock, also called "supervisory employees",

did no soliciting, but were alleged to have stood idly by while soliciting went on, or else, as in the case of Shock, to have been one of the first to propose organizing with the American Federation of Labor. As to Bolander and Dininger it is very misleading to call them "foremen" on the third and second shifts, respectively. The working hours of the plant were divided into three shifts; first, the normal and principal shift, in which some 50 of the 63 tool room employees worked, the second, an evening shift in which eight or nine of the employees worked, and the third, an early morning shift in which four or five worked. McCoy and Dominick had complete charge of these shifts, one being in charge when the other was not there (R. 306). They would appear at various times on all three shifts, whenever possible. On the last two shifts there were not enough tool room men working to require a special foreman. Although Dininger and Bolander took charge, neither Dininger nor Bolander received any higher classification, no higher rate of pay, and did not have any greater power than other employees, other than to set up work for them.

Concerning all of these so-called "supervisory employees"—Bolander, Dininger, Shock and Fouts, particularly Fouts, who was said to be most active,—these men were what is known in the tool and die workers trade as "lead men". It is well known that a lead man is a tool and die maker who by reason of long experience has become skilled in the method of handling new jobs that come into the shop; in transposing them from paper diagrams to the actual shop job. He determines the best method of doing the job, which tools should be used, how the job is to be set up. This requires knowledge of measurements sometimes of one ten thousandths of an inch and is a species of the trade which only the older and more experienced tool and die men have mastered. However, all tool and die makers, whether specialized in this or another branch of the work,

consider themselves as occupying equal positions in the tool room, neither subservient nor superior one to the other. A lead man is not looked up to as an actual "boss" any more than one skilled in another branch of the tool and die trade, even though at time they may be so termed when directing the setup of work. So, for that matter, would an apprentice or helper call an ordinary machinist his "boss". All are highly skilled mechanics, and as such have a craft consciousness and solidarity, leaving no room for anyone to assume a position of superiority. The lead men, after having set up the work, then return to tool and die making themselves, unless it is a very large shop in which case they are sometimes engaged in setup or "lead" work a greater part of the day. It is true that because of a "direction" in starting a job, it is sometimes necessary for tool and die workers to come to the "lead man" before starting another job; but this is not because of a supervisory capacity, but rather because of their skill and experience necessary as a prerequisite to starting a new job.

The Board states that Fouts was "in charge of the Roll Department in the tool room and worked along side of certain machinists whom he directed". As explained, his duties consisted of setting up the work and in making "rolls" for the rolling department on which latter job he was the sole worker (R. 386) and his direction ceased once the work was set up. He worked on the first shift where either McCoy or Dominick were present a great majority of the time.²

² It is interesting to note that the attorney for the Board himself regarded Fouts as merely an ordinary employee. On Page 41 of the record as against the objection concerning Fouts' solicitation of a worker, that Fouts was himself only a fellow workman and as such his conduct was not binding on the company, the attorney for the Board answered by claiming since "the solicitations took place on company time and apparently in the presence of a foreman I certainly think such conduct is binding on the Company" rather than claiming Fouts to be any sort of a

These four men were merely older and more experienced employees. They had no power to hire or fire. Although it is stated that Fouts made recommendations, this was due to his seniority standing rather than to any official position he held. It is further to be noted that each of the alleged "supervisory employees" denied that they were in any supervisory capacity and denied that in anything they did they acted for or on behalf of the company or pursuant to any orders of the company. (R. 383, 347, 389)³ Their claim was that they were acting solely on behalf of the union to which they belonged and there is absolutely nothing in the record to refute this. These men were members of the union, in fact officers and members of the executive board of the union. Seemingly the Board would deprive skilled workers of their right to join and assist labor organizations, merely because of their skill. Certainly it cannot be because of any position of domination or control held by these two men.

2. Even if "Supervisory Employees," Still Nothing Coercive in Their Conduct.

Further, even assuming that these men did hold minor supervisory jobs, there was nothing in their actual conduct

supervisor. Likewise, note on page 42 where Witmer, a C. I. O. member, and testifying for the Board, states "they worked in the tool room. Walter Fouts was more or less an assistant foreman in that he had certain machinists under—in his charge—who manufactured rolls for the rolling and moulding department, and he was also authorized to sign requisitions and he also worked along with men who worked for him".

³ "Q. (By Mr. White:) Mr. Fouts, did any foreman or any supervisory officials or executives of the Serrick Corporation at any time, by means of any conversations or in any other manner, encourage you to join the union or endeavor to discourage you from joining any union? A. No, sir. I had already joined before they had ever thought about the union.

Q. Did any of those officials ever encourage you to continue your membership, or to solicit membership of any kind? A. No.

Q. Did you ever have any conversation with any such persons upon that subject? A. None at all."

which was coercive, nothing which would require attributing their statements to the employer. Fouts' alleged principal offense was that he solicited his fellow employees to join the I. A. M. Whatever solicitation Fouts did engage in was done without pressure, merely as a request. His solicitation was made as a member of the union, and the employees understood it as such. In one instance, there is a rather vague statement that Fouts asked a fellow employee—one Levi Benn—if he did not think it would be his job if he did not join. (R. 90.) This statement was very probably made in connection with the signing of the closed shop contract with the I. A. M., and in any event it certainly was not said in the capacity of a supervisory employee and was not so understood by employee, Benn. Further what was said was in the nature of a statement of an opinion by Fouts in view of the company's past antagonism toward the C. I. O., an antagonism for which the I. A. M. is in no way responsible. The incident is at best an isolated one. No other remark of a threatening nature was attributed to Fouts by any other witness.

The only other activities complained about are Bolander's in not reprimanding an I. A. M. committeeman for soliciting in his presence, and a statement of Dininger's which was made to Fensel on August 10th, promising a better rating. As before stated Bolander, at most merely passed on McCoy's directions, and could not have said anything if he wished. What is more Bolander strongly denies any such occurrence (R. 382).

Concerning Dininger he is likewise just a lead man, and it is difficult to see what better rating, if any, he could have given Fensel. There is no explanation offered as to what was meant by this statement. Further, these remarks, if it is true they were made, were made on August 10th after the closed shop contract was entered into, and when Dininger was a member of the I. A. M. This too is

an isolated incident, hardly attributable to the employer, even if true.

A good example of the extremes to which the Board has gone in this case in an effort to make out a case against the employer is seen in its finding that Lewis, the company's personnel employment manager, had on August 6th endeavored to interfere and coerce the employees and to assist the American Federation of Labor, by asking Witmer and Sharpe why they did not join the American Federation of Labor, and advising them to straighten things out and have one organization in the plant. The Board did not relate the entire conversation between Lewis and the two employees at that time, and consequently it does not appear under what circumstances or for what purpose the remark was made. The entire conversation is related by Lewis at R. 341. Lewis' version is substantiated by Sharp at R. 57 and Witmer at R. 49. It shows that Mr. Lewis, while walking thru the plant on that date, engaged in a friendly conversation with Sharpe, who was an old friend of his. Sharpe started the conversation by facetiously asking Lewis when he was going to join the C. I. O., to which Lewis jocularly replied that the A. F. L. had offered him more money so he had joined the A. F. L. Everything said during that particular conversation was said solely in a spirit of fun, as the slightest reading of the record will indicate, yet the Board has seized upon this "kidding" incident to find employer coercion.

The Board claims that the solicitation by Fouts and other employees was done "*pursuant to the known desires of the employer, and on behalf of a labor organization favored by the employer*", and that accordingly these solicitations by minor supervisory employees must be attributed to the employer even though the so-called supervisory employees are members and officers of the union. However, there is not one whit of evidence in the record to indicate

that the solicitations were done pursuant to any *known* desires of the employer or that the I. A. M. organization was even favored by the employer, other than by the fact that minor supervisory employees, members of the I. A. M. solicited on its behalf. The Board reaches its conclusion, then, by the following circular reasoning:

The Board says that because minor supervisory employees, members and officers of a union, had openly engaged in solicitation on the union's behalf, it was permissible to make a finding that the Company favored that union and had made known its desire for its employees to join it; and then the Board states that because the company had made known its desire, the acts of the minor supervisory employees are attributable to the employer, even though its minor supervisory employees are members or officers of the union. In other words, the Board arrives at the finding necessary or prerequisite to being able to attribute the minor supervisory employees conduct to the employer—to wit, the finding that the employer had made known his desires in the matter—by the very fact of the minor employees' solicitation itself.

When officers and members of a union solicit membership for that union, at least the *prima facie* inference would seem to be that these activities are carried on on behalf of the union, not on behalf of the employer. However, the Board places the inference the other way, and without any other supporting evidence whatsoever finds that the employer desired the American Federation of Labor, and made the fact known to his employees. If there was anything at all in the record which indicated that there was any "known desire" on the part of the employer to have the American Federation of Labor in its plant, other than the very fact of solicitation by union officers, then it might reasonably be said that this solicitation could be attributed to the employer. However, there is not a

single remark by any supervisory employee, or any foreman, or any one not a member of the union, and connected in an official capacity with the company, to indicate a desire or preference for the American Federation of Labor.

Under the Board's ruling, minor supervisory employees, mere straw bosses, who are eligible to and are members and even officers of a union, are forever barred from speaking for their union. The present case is even more exaggerated, for here the soliciting employees could not even be called minor supervisors. It was a course of actual coercive practice that the Act was designed to prevent, not mere activities by union members happening to hold minor supervisory positions, where the evidence discloses no other indication of company coercion or favoritism, other than the acts of these minor supervisory employees themselves.

B. Electioneering Activities Were Carried on During Company Time by Both of the Organizations in the Plant, and no Privilege was Granted or Accorded to the I. A. M. Which was Denied the U. A. W.

The second important factor which the Board entirely overlooks and which is connected with the discussion above, is the fact that the employer proffered no privileges to the I. A. M. which were denied to the U. A. W. and that during the entire period that the I. A. M. solicitation in the tool room was alleged to have been carried on there was also constant solicitation on behalf of the U. A. W. Every single Board and U. A. W. witness admitted that there was very much agitation in the tool room during this entire period from July 28th to August 11th when the tool room contract was signed, and most of them testified that solicitation was engaged in by both of the contending unions. There prevailed a tense spirit of rivalry from the day that the I. A. M. local was formed. Theretofore the U. A. W. had been organizing generally in the plant, but immediately attention

was drawn particularly to the tool room. It was testified by many witnesses that work was disrupted in the tool room, efficiency lessened, that there was constant argument and bickering, some good natured and some not. As to the various instances of solicitation by the U. A. W. we refer the Court to testimony of almost any of the witnesses. See particularly R. 37, 38, 101, 254, 258, 308, 335, 361, 368, 379, 381, 395 and 427. These above portions of the testimony show that the U. A. W. carried on a campaign of electioneering and solicitation at the same time that the I. A. M. did and during working hours. There are even instances where some of the employees (Birod particularly) solicited first for the U. A. W. and then for the I. A. M.

On the other hand there is testimony by six different Board and U. A. W. witnesses, toolroom employees, to the effect that they at no time were personally solicited by the I. A. M. and did not observe a great deal of solicitation by the I. A. M. although there was a good deal of discussion. (See R. 61, 81, 82, 83, 94, 101.)

In spite of the showing in the record of solicitation and electioneering activities by both parties to the controversy the Board infers that the company granted favors and assistance to the I. A. M. which were denied to the U. A. W. The only instance which the Board gives in support of this inference is that the Company's supervisors reprimanded Cletus Garrett for posting a notice of a U. A. W. meeting on the plant bulletin board. Cletus Garrett was active on behalf of the U. A. W. in the production department.⁴ The alleged act occurred on June 19, 1937, long prior to any attempt by the I. A. M. to organize in the tool room, and concerned a meeting of production employees as distinguished

⁴ It is to be noted that Cletus Garrett's brother, Walter Scott Garrett was a set-up man in the production department and as such as much of a supervisory employee as Fouts et al. (R. 26-8). Yet the Board made no objection to his soliciting activities.

from tool room employees. There is no showing and it is not a fact that the I. A. M. was ever permitted to put up any notice where a similar privilege was denied the U. A. W.

As against this one incident relied on by the Board in support of its finding that the company gave assistance to the I. A. M. which was refused to the U. A. W., we have the testimony of the man in charge of the tool room as to the difficulty he had preserving order and maintaining an impartial attitude. McCoy, the foreman, testified (R. 307-309) that he had a great deal of trouble trying to keep order in the tool room, that there was constant talking; that he reprimanded members of both unions (and this testimony is undenied); that the situation worried him terribly and he did not know what to do about it, as he was trying to maintain a neutral attitude as per his instructions. His testimony is supported by the testimony of Floyd Stevenson, a member of the C. I. O. and a witness for the Board, who testified that (R. 100):

“Q. Did you have any conversation with Mr. McCoy?

A. Yes, sir.

Q. Will you tell us what that conversation was and when it was? A. Well, it was right before the time I got laid off. He was going around there rather nervous or something and I happened to run out of a job and I said something to him about it looked like he was tireder than I was or something and he says, “They got me in a mess around here. I don’t know whether I am coming or going, got these two unions here fighting each other. I don’t know what to do. I can’t stop it and I can’t say anything to them”. And he says, “The A. F. of L. members come and tell me what they are going to do but the C. I. O. doesn’t say anything. I can’t tell where to turn.”

McCoy’s testimony is likewise supported by that of the plant manager, E. T. Murphy, who testified that (R. 259):

“Q. Now, you say that Mr. McCoy had something to say about solicitations going on. A. Yes.

Q. Is that correct? A. Yes, sir.

Q. Was his statement as to that about the same as the statement of Cecil Shock. A. Well, Mack said that they were spending about half of the time out there running around soliciting members; that he could not catch them at it but he knew what was going on.

Q. He knew that that was going on in the entire tool room, did he? A. In the entire shop."

and by the testimony of Cecil Shock, who testified (R. 367):

"Q. Now, did you ever talk with Mr. McCoy about the conditions in the tool room? A. Mr. McCoy never talked to me about unions.

Q. Well, did he ever talk to you about the situation in the tool room with regard to this labor agitation, and so forth? A. Yes, he had. He told me that he wished it would clear up so that he could start getting some work done. They were about in the peak of their tool room work at that time and it was of vital importance that they get that work out, and they were not getting it out. He told me that 'they sure make it tough on me with all of these arguments, and so forth, going on around here.' He said that he would like to see the situation cleared up.

Q. Is that the substance of all the conversation you had with him on that matter? A. It was just about the work. That is just about what it pertained to.

Q. Did he ever tell you where his own sympathies lay? A. Mr. McCoy was a rather close mouthed person. He didn't talk about those things.

Q. You have testified that there were debates going on around in the plant about the U. A. W. and the A. F. of L., I believe. A. Yes, that's right."

The Board makes a point of the fact that electioneering activities were carried on quite close to McCoy, six or eight feet, and he should have known what was going on and interceded. Francis Witmer, a member of the C. I. O. and witness for the Board states in this respect (R. 48-49):

"Q. You frequently had to go from the tool room out into the production part of the plant? A. During

the productive season, we did. During actual manufacture of the tool, of the building of the tool, we did not have a whole lot of occasion to visit other parts of the plant.

Q. But you were at liberty to go? A. Yes.

Q. Whenever you chose to do so? A. Yes, if we had a bona fide reason for leaving the tool room.

Q. Well, all during the time that you were there, were you ever questioned for leaving the tool room or going some place in the tool room? A. No, I never was questioned.

Q. Now, isn't it a fact that on account of the technical nature of your work which you do in the tool room, it was frequently necessary for you to go to one of the other employees doing like work, to discuss the advisability of handling the work certain ways? A. Very true.

Q. So that it frequently occurred that employees of that tool room would be in conversation with each other concerning work? A. Sure, that is true.

Q. And the foreman of the department or the supervisory officials wouldn't know what they were talking about, unless they were present, of course? A. Not unless they were present or persons were talking extremely loud.

Q. That is right. Well, these employees that were soliciting, came to you soliciting members in any particular union were not talking loud were they? A. No, they were not talking loud particularly, but the applications were in plain sight.

Q. Well, you deal with papers and blueprints in that department don't you? A. I don't know I didn't see so very many blueprints down there.

Q. Drawings? A. We had a few drawings, yes.

Mr. White: I think that is all."

The Board makes much of the fact that Birod is said to have once stated to Sharpe that McCoy was an old Ameri-

can Federation of Labor man himself and that he wanted the tool room men to go into the American Federation of Labor. This testimony is unsupported by any statement or admission of any other witness or by any statement attributable to McCoy. It is at the best a mere opinion of Birod. McCoy's actions speak for themselves, and it is not denied that he reprimanded members of both unions for talking and soliciting.

In addition we have the unrefuted testimony of all the company's supervisory employees, including its vice-president and its general manager, its personnel director and several of its foremen—in fact all the supervisory employees who testified—that the company had given strict orders to all of the supervisory employees to maintain an impartial attitude and not interfere in any way with the attempt of the various unions to organize in the plant. It hardly looks like coercion or conspiracy for the Company to order and maintain a "hands-off" relationship, even though its production was seriously suffering because of the rivalry in the tool room.

Other circumstantial evidence clearly refutes any charge that the company was conspiring with the I. A. M. to defeat the U. A. W. For one thing, the company's history shows general opposition to all national labor organizations. A Board's witness testified (R. 63) that the Welfare Association, a company union, was originally formed by the company to keep out the American Federation of Labor.

Further the circumstances surrounding the actual making of the closed shop contract with the I. A. M. indicate quite clearly that there could have been no connivance. The Company objected strenuously to the inclusion of a closed shop provision in the contract (R. 253). If it was the intention of the Company to deal with the I. A. M. merely for the purpose of excluding the U. A. W., then it would seem that the closed shop provision would have been the first to have

been included. The testimony is also undenied that the reason that the Company finally agreed to the closed shop provision was as to end the dissension and trouble in the tool room and to enable the company to assume normal operations in the tool room (R. 254).

Another very significant circumstance is that the company's general supervisor, Mr. Westlund, who was dealing with the union at the time of the discussion of the contract, made a special point to contact Mr. Watson, who was the representative of the National Labor Relations Board in the 11th Region, to ask him whether it was proper to sign a closed shop contract under the then conditions. Mr. Westlund was particularly anxious concerning this closed shop provision and stated he did not want to get into any trouble with the Labor Board. Mr. Watson, after being shown the tool room, assured Mr. Westlund that under the circumstances, if the majority wished a closed shop it would be all right for the company to sign the contract. (See record 247-48).

Finally and most important it is greatly significant that the Trial Examiner, who saw and heard the witnesses, concluded that the company had not demonstrated any favoritism toward the I. A. M. and had in no way connived with it (R. 651, 652).

The Board makes quite an issue of an incident alleged to have taken place during the first meeting of tool room employees and the company on the afternoon of August 3rd at which time Shock was said to have stated that after the trouble was settled the company could tear up the contract. That this was said is strongly denied, not only by Shock himself (R. 353)⁵ but by Murphy (R. 268), Westlund (R.

⁵ "Q. Mr. Shock, did you make a statement in this meeting in substance to the effect that after this trouble was settled in there that you was going to tear this contract up? A. No, sir.

246) and Fouts (388). Westlund and Murphy, who are responsible members of the community, flatly contradicted this testimony. Shock denied it expressly. Fouts likewise expressly denied it.

More important, the trial examiner who was present and observed all the witnesses testifying, expressly found that the statement was not made (R. 651). In spite of this the Board considered the testimony of this one individual as outweighing that of the other four. This in spite of the entire unreasonableness of the statement, in spite of the fact that the Board's "independent supporting incidents" are denied (R. 292-3), in spite of the fact that it is not consistent with the subsequent difficulty in arriving at the agreement, and in spite of that fact that the contract would still be in existence but for the Board's action in cancelling it, and that at this moment the I. A. M. is fighting for its reinstatement.

Of course the statement is entirely irrelevant to the discussion unless the Board wishes to find the I. A. M. a company dominated union, which it has not done, but the I. A. M. resents such a finding and only cites it as an instance of the arbitrary manner in which the Board has proceeded in this case.

Q. You didn't say that? A. No, I did not.

Q. Did you make the statement in this meeting that this contract was presented there merely for the purpose of keeping the C. I. O. out of the plant? A. I did not. I explained that it was brought in there to take the tension off of the tool room; that something had to be done because the majority seemed to be in favor of this organization, and whichever way it went, why, it would clear up the situation in the tool room there. That is what I was desirous of."

The only two other members present at the meeting were Wise and McCoy. Wise did not testify anywhere in the proceeding and McCoy was not asked any question concerning this incident. Keil who attributed the statement to Shock was a member of the C. I. O. His testimony in respect to the statement was vague.

C. The Great Majority of the So-called Electioneering Activities and Solicitations Complained About Occurred Subsequent to the 6th of August at Which Time the Closed Shop Contract Had Been Entered Into.

The Board overlooks the fact that by far the greatest part of the so-called solicitation took place after the 6th of August. Since the closed shop contract was entered into as of such date any subsequent interference by the company is proper and permissible. Examination of the record discloses that the testimony of the Board and C. I. O. witnesses is very vague as to just when the various acts of solicitation and interference did actually take place. However, when the dates are any way definite, the acts of solicitation are definitely placed as occurring after the 6th of August. Without attempting to repeat each witness's testimony as to the dates it is sufficient to quote from the Trial Examiner, who states (R. 651):

*“ * * * It is significant that very little, if any, of the testimony given by the Board's witnesses positively placed the solicitation conducted by the members of Lodge No. 35 prior to August 6. While some discussion and solicitation on behalf of Lodge No. 35 probably occurred prior to this time, it is also significant that several of the witnesses called by Lodge No. 35, testified that they had been solicited for Local No. 459 during working hours in the tool room. This testimony serves to dispel the inference that respondent supported Lodge No. 35 in any solicitation in its behalf, at least prior to August 7. * * * ”*

It can hardly be argued that if the closed shop contract was in existence on the 6th of August, any interfering or even coercive activities after that date are unlawful. It becomes important to determine then, just when the closed shop contract which the Board invalidated was made and when the parties considered it a completed undertaking.

1. The Parties Had Agreed Upon and Completed a Contract on August 6th.

The evidence discloses that McDonald, the I. A. M. representative, first contacted the company's representatives for the purpose of discussing a contract on August 3. At that time a proposed agreement was presented. The parties agreed upon all terms except three: the closed shop provision, a provision relating to hours, and the provision concerning wage rates. The closed shop question was settled that afternoon. The wage rate disagreement was settled at a meeting on August 4, where certain wage increases were agreed upon. The only remaining point of disagreement between the parties was that relating to hours. The company's general manager, S. D. Murphy, left town the afternoon of the 4th to confer with Mr. Serrick, president of the company, who was in New York, concerning the contract. On the 6th Murphy wired Westlund from New York that "Agreement satisfactory, except forty hours. Make it forty four". That evening the I. A. M. membership held a special meeting for the purpose of approving the company's modification of the agreement concerning hours, and voted to accept the contract as made.

As soon as Mr. Murphy returned from New York on the 11th he signed the contract, which was dated August 6th. Although the form of contract used by the parties in their negotiations contained a clause stating that the contract shall become binding when signed, none of the parties regarded the signing as a necessary prerequisite to its validity or operation, and neither made any mention whatsoever of the necessity for signing. The contract was to run for less than a year.

Under the above circumstances there can be no question but that a valid binding contract was agreed upon on the evening of August 6th. The minds of the parties had met

on every single term and condition, minor or major, and nothing was left for further discussion or agreement between the parties. The fact that the contract was not signed until the 11th is quite immaterial. The general rule is that where the terms of a contract have in all respects been definitely understood and agreed upon, the failure subsequently to embody such terms in a written contract does not prevent the contract from being obligatory upon the parties, even when it is distinctly agreed between the parties that the agreement is to be made in writing and signed.

The fact that the parties at no time considered a formal signed instrument necessary to the completion of the contract, and had waived such requirement, is evidenced in the testimony of Mr. Murphy at R. 267. See also Mr. Westlund's testimony on R. 297.

The Board argues that the minds of the parties had not met on all terms as of the 6th; that there were some 15 of the 63 tool room employees concerning whom wage rates had not been specifically established until the 11th. Aside from the fact that this is highly technical, the evidence completely refutes this. It is directly testified and without contradiction, by Mr. Westlund (R. 250, 270, 294, 295) that there were no changes of any nature whatsoever made after the 6th and that the wage rates had been agreed upon prior to the 6th.

The Board's remaining argument, that the parties had not actually signed it until the 11th and that the contract provided that it shall not become binding until the signing, has already been discussed. Further it is clear that the particular provision in the contract referred to by the Board was waived by the parties. Can collateral attack by third persons operate to upset this waiver? The actual intent was to regard the agreement as binding as of the 6th. This was demonstrated by the fact that the contract

was dated back. Further the Trial Examiner found that the contract was completed as of that date (R. 650-651).

2. The Board Should Concern Itself With Reason and Motive for Employer's Conduct Rather Than Technical Application of Contract Law.

A more important consideration than technical niceties is this: the Board forgets that it is not a court of law sitting to determine distinctions of contract law. It is sitting merely to determine whether unfair practices were committed. The fact that the parties themselves regarded that a contract had been made as of the 6th is conclusive as to the reason for conduct subsequent to that date, regardless of whether technically there was a contract or not up to the 11th. The reason for the solicitation and for the so-called interfering activities was not a desire or intent to interfere with any labor organization, but rather an effort on the part of the employees themselves and the company to further the contract, both acting under the *bona fide* belief that a contract had been made. The only question is whether the parties so believed in good faith and for good reason. The Board should look at the realities of the situation. Here we have a contract on which there had been complete agreement, on which the parties had acted. The printed requirement on the form contract used by the parties in discussing the contract was neither a matter of essence nor debate. It is doubtful if the parties even knew of its existence and certainly it was not relied upon. Should the Board use this to destroy established bargaining relationships? The motive of the employer and not the technical application of rules of contract law should be the Board's sole consideration. Here certainly ample reason for believing a contract had been agreed upon did exist.

III.

THE BOARD HAS CONTROVERTED THE PURPOSES OF THE ACT IN DECLARING ILLEGAL THE COMPANY'S ACTIVITY IN THE PRESENT CASE.

A. The Board is Here Fostering a Spirit of Enmity Instead of Cooperation. It Ignores the Realities of Rival Organizational Activities.

The foregoing discussion of the three points—first, that the so-called supervisory employees exerted no influence or control over their fellow employees and their utterances were in no way or manner coercive or attributable to the employer; second, that electioneering activities were carried on during company time by both of the organizations in the plant and no privilege was granted or accorded to the I. A. M. which was denied the U. A. W., and third, that the great majority of the electioneering activities and solicitations complained about occurred subsequent to the 6th of August at which time the closed shop contract had been entered into—indicate quite clearly that the Board has gone far astray in interpreting the evidence before it. But a further and much deeper significance can and must be attached to what the Board has here done. The Board, by ignoring realities, by failing to take a realistic and long view approach to the problem before it, and by forgetting what the ultimate objects of the Act are, has established principles which will go far to prevent realization of the ideal of amicable industrial relations achieved through collective bargaining with *bona fide* labor organizations. If the activities which took place in connection with the attempted organization in this plant by two rival labor organizations are to be outlawed as unfair practices, then in nine out of ten cases where rival national organizations

are contending there will likewise be found countless incidents of the same general type here proscribed which can be used as a basis for upsetting the stable relations resulting from entering into collective bargaining contracts. It is inevitable that minor supervisory employees eligible to and members in organizations will speak on behalf of their organizations. It is inevitable that the employer will have a leaning one way or the other. It is inevitable that a spirit of rivalry will produce remarks and accusations which would not ordinarily be made. In such cases, is the Board to seize upon the slightest remark made by the most minor of supervisory employees as a reason for destroying a contractual status that has been finally reached? Is a spirit of enmity between the employer and his employees a necessary concomitant of a "hands off" policy? Is the employer to be forced to take affirmative steps to punish, and to reprimand, so as to prevent what are the natural results of rival organization activity in his plant? Are all efforts at cooperation, all attempts at friendship, all extensions of courtesy to be outlawed and forbidden, regardless of their actual coercive effect? Is not the Board instead to look solely to the realities to try to ascertain whether in fact there has been coercion which overcomes the will of the employees, which actually compels them to join one of the two organizations.

B. Realities Must be Observed to See Whether Actual Coercion Has Been Practiced Before Employer Statements are Illegal and Before Conduct of Minor Supervisors is Attributable to Employers.

Certain realities must be regarded. The fact that two national organizations are involved and that there is no question of company domination of either of the unions, as would be the case if one were a company union, is of great importance. The Board seemingly has overlooked this ele-

ment entirely. This circumstance renders conduct which in other circumstances might be considered as imputable to the employer and as open to suspicion of being an attempt to dominate, entirely innocuous.

It is submitted that in view of the purposes of the Act—to foster group unionization—and in view of the fact that here national organizations are competing, the activities of the employees which are to be attributed to the company must be scrutinized more closely than if a company union were competing, and that a showing of conduct by the employer that amounts to an actual compulsion by the employer must be made before it can be said that the employer has interfered with and coerced his employees in the exercise of any of their rights. Here the Board has imputed conduct to the employer which if regarded in a natural or realistic fashion, would appear no more to coerce or compel its employees into joining one of the two rival unions than as if the alleged unlawful statements were made by ordinary rank and file workers. The term “interfere with, coerce, and restrain,” must be given a sensible construction. What that construction shall be has been prescribed by U. S. Supreme Court in the case of *Texas and New Orleans Railway Company v. Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 74 L. Ed. 1034. There the Court said in respect to a similar phrase as used in the Railway Labor Act:

“ * * * The intent of Congress is clear with respect to the sort of conduct that is prohibited ‘Interference’ with freedom of action and ‘coercion’ refer to well-understood concepts of the law. The meaning of the word ‘influence’ in this clause may be gathered from the context. *Virginia v. Tennessee*, 148 U. S. 503, 519, 37 L. Ed. 537, 543, 13 Sup. Ct. Rep. 728. *The use of the word is not to be taken as interdicting the normal relations and innocent communications*

*which are a part of all friendly intercourse, albeit between employer and employee. 'Influence' in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls 'self-organization.' The phrase covers the abuse of relation or opportunity so as to corrupt or override the will, and it is no more difficult to appraise conduct of this sort in connection with the selection of representatives for the purposes of this act than in relation to well-known application of the law with respect to fraud, duress and undue influence. * * **

It should be noted that the word "influence" is used in the Railway Labor Act, and is not used in the National Labor Relations Act, and that the word "restrain", having a much more limited meaning, is substituted.

In the Texas case we have a definitely prescribed, rationally restricted interpretation of the meaning of the Board term "interference, coercion and restraint". The phrase implies actual compulsion and it means an overcoming of the will. It does not interdict normal relations between employer and employees. Such an interpretation is the only one possible consistent with the purpose of the Act.

Another important reality which the Board has failed to consider is that in the present case we are not only concerned with an employer's unfair practices but also with the fact that these practices operate to upset an existing binding contract producing amicable industrial relations and of substantial benefit to the I. A. M. and employees in the tool room. This is not the ordinary case where a cease and desist order will merely affect the employer. Here the cease and desist order will also vitally affect third parties—the employees in the tool room and the I. A. M. Under such circumstances it is submitted that the Board should view the activities of the employer in a much more con-

sidered and realistic manner than is necessary in the ordinary case of employer activities so that the rights of all third parties, having no control over the employer's actions, are regarded. The upsetting of contracts is a serious proposition and every factor should be weighed carefully. In the absence of actual coercive conduct by the employer and in the absence of a clear inference that the activities of minor supervisory employees are actually attributable to the employer, the Board should proceed with caution before attempting to upset existing contractual relationships.

Further, the injustice to the machinists employed in the tool room who indicated their desire to affiliate with the I. A. M. is magnified by the fact that not only have they lost this right to belong to an organization of their own choosing, but also that they are in danger of losing their very jobs, for the Board has turned over to the U. A. W. the power to make a closed shop contract covering all the employees including the tool room employees, which can operate to deprive them of their work.

C. The Consolidated Edison and Jefferson Electric Cases Are Decisive of the Present Issue.

Two cases, one decided by the Supreme Court of the United States and the other by the Circuit Court of Appeals for the Seventh Circuit lend much support to the foregoing arguments.

The first case is that of the *Consolidated Edison Company of New York v. N. L. R. B.*, 59 Sup. Ct. 206, decided December 5, 1938. The following citations are given from that case in support of our arguments concerning the Board's failure to give more weighty consideration to the fact that it is upsetting a contractual relationship; that the Board did not take into account the fact that two national labor or-

ganizations were competing and no company union was involved; that actual coercive practices must be indulged in by the employer before he can be found guilty of violating the Act; that the Board cannot inflict punitive orders; and that the Board must proceed with caution before interfering with the rights of innocent parties—the employees and the union, whose contract was annulled:

“... Assuming, as counsel for the companies urges, that where two independent labor organizations seek recognition it cannot be said to be an unfair labor practice for the employer merely to express preference of one organization over the other, by reason of the former's announced policies, in the absence of any attempts at intimidation or coercion, we think that there was still substantial evidence that such attempts were made in this case.

It would serve no useful purpose to lengthen this opinion by detailing the testimony. We are satisfied that the provisions of the order requiring the companies to desist from the discriminating and coercive practices described in subdivisions (a) to (e) inclusive and in subdivision (h) of paragraph one of its order, and to reinstate the six employees mentioned with back pay, and to post notices assuring freedom from discrimination and coercion as provided in paragraph two of the order, rested upon findings sustained by the evidence and that the decree of the Court of Appeals enforcing the order in these respects should be affirmed.

* * * * *

The findings of the Board that the contracts with the Brotherhood and its locals were invalid, and the Board's order requiring the companies to desist from giving effect to these contracts, present questions of major importance. We approach them in the light of three cardinal considerations. One is that the Brotherhood and its locals are labor organizations independ-

ently established as affiliates of the American Federation of Labor and are not under the control of the employing companies. So far as there was any charge, under Section 8 (2) of the Act, that the employing companies had dominated or interfered with the formation or administration of any labor organization or had contributed financial or other support to it, the charge was dismissed. Another consideration is that the contracts recognize the right of employees to bargain collectively; they recognize the Brotherhood as the collective bargaining agency for the employees who belong to it, and the Brotherhood agrees for itself and its members not to intimidate or coerce employees into membership in the Brotherhood and not to solicit membership on the time or property of the employers. The third consideration is that the contracts contain important provisions with regard to hours, working conditions, wages, sickness, disability, etc., and also provide against strikes or lockouts and for the adjustment and arbitration of labor disputes thus constituting insurance against the disruption of the service of the companies to interstate or foreign commerce through an outbreak of industrial strife. * * *

Further, the Act gives no express authority to the Board to invalidate contracts with independent labor organizations. That authority, if it exists, must rest upon the provisions of Section 10 (c). That section authorizes the Board, when it has found the employer guilty of unfair labor practices, to require him to desist from such practices 'and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.' We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.

The power to command affirmative action is remedial,

not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act. The continued existence of a company union established by unfair labor practices or of a union dominated by the employer is a consequence or violation of the Act whose continuance thwarts the purposes of the Act and renders ineffective any order restraining the unfair practices. Compare *National Labor Relations Board v. Pennsylvania Greyhound Lines*, supra. Here, there is no basis for a finding that the contracts with the Brotherhood and its locals were a consequence of the unfair labor practices found by the Board or that these contracts in themselves thwart any policy of the Act or that their cancellation would in any way make the order to cease the specified practices any more effective.

The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining. Under Section 7 the employees of the companies are entitled to self-organization, to join labor organizations and to bargain collectively through representatives of their own choosing. The 80 per cent of the employees who were members of the Brotherhood and its locals, had that right. They had the right to choose the Brotherhood as their representative for collective bargaining and to have contracts made as the result of that bargaining. *Nothing that the employers had done deprived them of that right.*"

The second case involving the foregoing arguments is more directly in point than the Consolidated Edison Company case, for the reason that the Court there found that activities greatly similar to those relied on by the Board in the present case were not oppressive or coercive. This decision is *Jefferson Electric Company v. National Labor Relations Board*, decided by the U. S. Court of Appeals for

the 7th Circuit, March 31, 1939. In that case the evidence respecting the employer's alleged interference with the employees in the free choice of their representative and respecting alleged coercive activities was much more impressive than the evidence relied upon by the Board in the present case. There, as here, soliciting activities of minor supervisory employees were attributed to the employer.

Judge Koerner, speaking for the entire court (there was no dissent) reversed the Board's finding of company coercion and assistance, and stated in regard to such activities as follows:

"The main issue before the Board involves the question whether the closed shop contracts were intended to effect illegal labor practices. That is, the real issue is whether there is substantial evidence to support the Board's finding that Jefferson Electric committed the unfair labor practice of fostering the Brotherhood and of dealing exclusively with that union while its numerical strength remained in doubt. If the evidence justifies this finding, it is clear that Jefferson Electric has violated Secs. 158(1), (3), U. S. C. A. Thus, "8(1)" would be violated because there is an interference with the worker's free choice to select his bargaining agent, and "8(3)" would be violated because membership in the Brotherhood is encouraged and membership in the United is discouraged, thereby discriminating in regard to conditions of employment. Such action on the part of Jefferson Electric would make inoperative the "8(3)" proviso, which sanctions closed-shop contracts, since the proviso's two conditions are absent, i.e., an uncoerced and non-assisted majority.

The attitude of the courts as to the evidence before the Board has been amply expressed in the past.

* * * * *

The United States Supreme Court has also spoken:

'We agree that the statute (The National Labor Relations Act), in providing that 'the findings of the

Board as to the facts, if supported by evidence, shall be conclusive,' means supported by substantial evidence. . . . Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Consolidated Edison Co., et al. v. National Labor Relations Board, et al., U. S. Law Week 425, at p. 428.

See also National Labor Relations Board v. Columbian Enameling and Stamping Company, Inc. decided by the United States Supreme Court Feb. 27, 1939.

* * * * *

In the instant case there were no threats so as to intimidate the employees into joining a particular labor organization against their will, and there is no evidence in the record which would warrant a finding that the conduct of the company was indicative of coercion or intimidation. To us it is clear that the company had come to a realization that its plant was about to be unionized. It had for many years maintained friendly relations with its employees and desired that such relations continue. It was in this spirit that it allowed the use of the cafeteria and other plant privileges. Such acts, standing alone, are not inconsistent with a strict 'hands-off' policy. It was never the intention of Congress to prohibit friendly intercourse between employers and labor organizations, to curtail freedom of speech, to deprive an employer of his right to express an honest opinion or to outlaw the extension of common courtesies. It is more in keeping with the purpose of the Act to foster such friendship rather than to condemn it.

* * * * *

Viewing the record as a whole, it is difficult for us to point out evidence acceptable by the reasonable mind as adequate to support the conclusion that prior to May 17 the company had undertaken any affirmative action,

which could be construed as conduct preventing unionization, discouraging employee affiliation with the United, or encouraging employees to become members of the Brotherhood. On the contrary the record discloses that petitioner maintained an attitude of neutrality respecting all organizational activity among its employees. The most that can be made out of the record is that petitioner was showing a preference toward the Brotherhood but extended acts of cooperation toward both unions.

But while it is true that employer leadership through supervisory employees is condemned by the Act, and that pressure overriding the will of the employees, as a means of encouraging or discouraging membership in any labor organization, constitutes interference with a worker's right to select his representative, it does not follow that the mere showing of a preference and acts of cooperation constitute interference with an employee in his exercise of the rights guaranteed under the Act."

It is submitted that the Jefferson decision is entirely decisive of the present case.

The decision by the Supreme Court in the Consolidated Edison Company case, *supra*, gives support to the following argument which we ask this court to consider: Assuming that there were coercive activities, should not the Board merely have ordered them ceased, and merely stricken the closed shop provision from the contract, instead of invalidating the entire contract? This is on the principle that the workers are not to blame for whatever practices went on in the plant, that some of them certainly were not coerced, and that they are entitled to retain the benefits of the contract conferring benefits on them and fostering peaceful and industrial relations. The Board has power merely to annul these provisions which it finds contrary to the Act, which in this case would be only the closed shop provision. A copy of the tool room contract is set forth at R. 8.

IV

THE TOOL ROOM EMPLOYEES CONSTITUTE AN APPROPRIATE UNIT UNDER THE ACT AND THE BOARD SHOULD HAVE SO HELD, OR AT LEAST SHOULD HAVE PERMITTED THE TOOL ROOM EMPLOYEES TO EXPRESS THEIR CHOICE BY PERMITTING A VOTE ON THE QUESTION.

The next argument is concerned with the correctness of the Board's finding as to the appropriate unit. While the argument is not an alternative one, nevertheless, we can assume as correct the findings by the Board that the activities of the employer did amount to coercion. Nonetheless it is submitted that the Board has erred in failing to designate the tool room employees as an appropriate bargaining unit and that it has departed from its own applicable decisions and rulings in prescribing a unit consisting of all production employees in the plant, including tool and die workers, but excluding buffers and polishers.

The vital importance of a correct determination of this appropriate unit question, not only to the International Association of Machinists, but to the American Federation of Labor as well, cannot be too strongly stressed. On the correctness of this determination depends the very existence of a great many of the American Federation of Labor affiliates. If the Board is to be permitted to destroy established craft units for reasons such as have been advanced in the present case or in the exercise of a punitive jurisdiction and without regard to previous principles laid down by the Board it will have been given the life and death powers of a dictator over the oldest and largest branch of organized labor. It will be able, as was done here, to destroy a unit and to bend it in the interest of a rival competing union whose form of organization it prefers. It will be able to

stifle organization along lines which have been carried on for over fifty years.

A. Tool Room Employees Constitute an Appropriate Bargaining Unit.

Tool and die makers compose an historic craft. By reasons of skill, by reasons of long years spent in apprenticeship training, by reason of specialization of abilities, by reason of the handicraftsman's pride in his work, tool and die workers have clung together in American industry as a group separate and apart from other mechanical workers. They have received higher wages, have commanded respect and freedom in a plant, are looked up to as skilled technicians, and generally enjoy an advanced position in the field of labor. Their working quarters are usually separated from the rest of the production departments of the plant, either by being enclosed in a separate room or being set off by fences and gates, as in the present case. The chart introduced as petitioner's exhibit No. 2 (R. 635) indicates the general set up of a tool room. The principal organization in which tool and die workers are enrolled is the International Association of Machinists, which usually charts tool and die workers into separate locals if the size of the plant warrants.

All of the above factors, common to all tool and die makers, establishing the tool room as a separate unit, have been clearly brought out in the record as present in the instant case. See R. 159, 239, 270, 276, as to the physical set up of the tool room and its operations and functions in the plant. See R. 237 and 238 as to the four to five year apprenticeship requirements. See R. 239 as to the skill required of tool room workers.

In designating a unit appropriate for collective bargaining the Board has customarily looked to certain factors and circumstances as indicating the appropriateness of any

given unit. These factors are set forth in its Third Annual Report, pages 156 through 196. Generally such factors as self-organization, experience, duties, wages, working conditions, community of interests, training and extent of responsibilities, organization of employers business, history of labor relations in the industry, mutuality of interests, and skill have been considered as determinative. In view of the facts outlined above it can be expected that if the Board is to apply these principles in the usual case, it cannot help but designate the tool and die employees as an appropriate unit. *As a matter of fact the Board has classified the tool and die workers as a separate unit in every single instance in which the I. A. M. has asked the Board so to do—that is, except in the present case, which differs in no respect from the usual one.* This is very important. It indicates that physical factors at least are sufficient to classify tool room employees into separate units to be bargaining for by their own representatives. It becomes important, then, to examine the reasons advanced by the Board for its present divergence from its general practice.

Admittedly in the present case the tool room employees constitute a well defined craft, for the Board states in its decisions that where a well defined craft does exist (necessarily as in the present case), and there is a dispute or disagreement among members of that craft as to whether they wish to maintain the craft or bargain on an industrial basis, the Board will ordinarily call for a vote, so that the employees in the craft can decide the question for themselves. But the Board does not permit this vote—instead it advances two reasons for refusing so to do and for certifying the larger unit. The first is that the employer's conduct in influencing the members of the craft group as to the form of organization they desired destroyed that choice and thus the craft; and second, that because the I. A. M. chose to

organize both the tool room and production workers at approximately the same time, it made artificial the two units and it estopped itself from claiming a separate tool room unit. Let us examine just how valid these reasons are, and let us see what is their effect.

B. The Board's First Reason for Refusing to Designate Tool Room Unit is Erroneous and a Non-Sequitur, and is Contrary to Its Own "Globe Doctrine".

In its first reason the Board has laid down the preposterous principle that unfair labor practices of an employer can operate to determine a unit and to destroy a previously appropriate one. For nothing more nor less than this astonishing rule has been prescribed. If the Board denies this let it answer one question: *Assuming there were unfair practices influencing the free choice of employees in the tool room and that the resulting contract was rightfully set aside, why did not the Board none the less order an election so as to let the employees determine the unit, but insulating the effects of the employer's activities by setting the election for whatever future period it deemed necessary in order to permit the coercive effects of the alleged unfair practices to abate; and why did it not preserve the unit until such time as that could have been done?* The significance of this question will become apparent in the course of the ensuing discussion.

The Board has determined, and it cannot deny, that tool room employees constitute what can be called at least a "*prima facie*" appropriate unit. This is true, first by its previous decisions, and second by the admission in the present case that where a well defined craft does exist it would ordinarily have permitted a vote. The practice of taking a vote in contested cases where there presumably exists a craft unit is what is known as the Globe Doctrine. See page 168, N. L. R. B. Third Annual Report. There is

implicit in this doctrine an assumption of the existence of at least a *prima facie* appropriate unit. This assumption is a necessary prerequisite to calling the doctrine into use—i.e. before the doctrine can be invoked the considerations and factors must be such as to indicate that the craft unit might very conceivably be appropriate. This is what the fact is in the present case. In such cases the Board says that it will permit the employees themselves to decide in what manner they wish to be represented. Now suppose the employer has influenced his employees in that unit to choose one representative as against a rival representative. Is there any reason why this action should operate to destroy the existing *prima facie* unit? It may very well be that the employees cannot express their free choice and desire until after the employer has been ordered to cease and desist his practices and until after the affects of his activities have worn off, but should the acts of the employer, over which neither the union contending for the particular “favored” unit nor the employees in the unit have any control, overcome all the circumstances and factors found by the Board to exist and to constitute a *prima facie* appropriate unit? Surely none of these circumstances are in the least changed or altered by the employer’s activities. If, previous to the unfair practices, there existed a mutuality of interest by reason of skill, by reason of apprenticeship requirements, by reason of higher wages, by reason of historical dealings, by reason of physical factors, these circumstance are still in existence after the unfair practices. Why should any act of coercion or discrimination on the part of the employer among employees in that unit operate to destroy it? If the Board would have proceeded to apply the Globe Doctrine in the absence of unfair practices, why should it not proceed to apply the Globe Doctrine when unfair practices have been found to exist, assuming that sufficient time is given so that the effect of the unfair practices

could have worn off? The only proper concern of the Board in such cases would seemingly be to see to it that the choice of the employees is exercised under fair conditions. In the present case the Board has instead gone to the extreme extent of penalizing not only the employer but the union and its employees who belong to that union, and has permitted the employer's acts to destroy the unit.

This is all the more unexplainable when it is considered that in all other cases where unfair practices were found to have destroyed free choice, as in cases where illegal contracts have been entered into, or as in a case where an election has been won because of employer's activities, the Board has merely ordered the employer to cease such practices, and then, where requested or warranted, has directed an election to be held in the future when the affects of the unfair activities shall have diminished. In such cases it does not change the unit in which the contract was made or in which an election was held. Why is not that procedure followed in the present case? There is no difference in applicable principles. In both cases the Board is interested only in finding out what the employees want. And yet in the present case the Board has suddenly become interested only *in what the employer does not want*, and disregards both employees and the union in seeing to it that the employer does not get it. If this is not punitive jurisdiction, condemned in the *Consolidated Edison* case, then nothing is.

It is submitted that the reason given by the Board in the present case for not designating the tool room employees as an appropriate unit or for at least not permitting an election to determine the question is not only contrary to its previous practice and contrary to the proper performance of its duties, but is in addition an attempt to punish not only the employer but also the union and the employees in the unit as well.

C. The Board's Second Reason for Refusing to Designate the Tool Room Unit Is Erroneous and Illogical, and Constitutes an Officious Interference with the I. A. M.'s Internal Organizational Policies and Practices.

The second reason advanced by the Board for refusing to designate the unit asked for by the I. A. M. is that the I. A. M. had chosen to organize both the tool room and production departments at approximately the same time, thus making artificial the unit contended for, and estopping itself from claiming a separate unit. It is to be noted that Chairman Madden refused to accept this reasoning, and dissented from that portion of the opinion.

In the first place it is not the fact that the I. A. M. attempted to organize both the tool room employees and the production employees at approximately the same time. Organization in the tool room had been completed and the closed shop contract entered into by August 6. It was not until August 10, by the Board's own findings, that the I. A. M. attempted to organize in the production department, and it was not until October 15 that the Production Local obtained a charter. It was not until after it established a distinct local, Local 35, to which only tool room employees were eligible that it turned its hand to organizing in the production department, and this likewise was done in a separate local covered by separate rules and by-laws.

The Board argues that this division was artificial. Why it was artificial is not stated. For many years the I. A. M. has organized production and skilled workers into separate distinct locals whenever the size of the plant or community warranted it. This practice is one prescribed in its constitution; it is one which it has customarily followed. Its constitution (Art. A, Section 2) defines in detail what workers are to be considered "machinists," "specialists," "apprentices," and "production workers." (R. 590-91)

To qualify as a "machinist" a person must have served an apprenticeship of at least four years. A "production worker" is defined in Section 7 (R. 592) as follows: "In the machinists craft a production worker is a person engaged in repetitive machine work, assembly work, or bench work requiring less training, experience or skill than would be necessary to qualify one as a machinist." Section 6 of Art. A, (R. 593) states that in localities where there are sufficient numbers of machinists, die sinkers, tool and die workers, specialists, production workers or machine helpers employed in any one or more divisions of the trade, *separate local lodges* may be organized for the benefit of these employees in their respective divisions." It is then provided that in localities where there are not a sufficient number of machinists, tool and die makers, specialists, production workers or machine helpers, mixed local lodges may be organized with a membership composing all persons employed in all divisions of the trade.

In practice the provisions of Sec. 6 have been construed to require separate local lodges wherever possible.

Section 8 provides that each local lodge may adopt its own by-laws.

The foregoing provisions of the constitution explain why organization was carried on in the plant in the manner that it was done, i.e., into two separate locals. This is a practice which has been carried on for many years depending on the circumstances in each case. However, regardless of the reason for so doing, it is submitted that what the International Association of Machinists, acting through grand lodge representatives, does is entirely its own business. The National Labor Relations Act was not passed for the purpose of giving the Board a carte blanche to inquire into the internal workings of labor organizations and to probe their organizational policies with the end of agreeing or

disagreeing therewith. Rather the Board was empowered to concern itself only with employer activities. As incident thereto it must determine units appropriate for bargaining purposes—units which shall not be hand-picked by employers or established in their interest. The Board effectuates no known policy of the Act by denouncing an attempt at organization by a bona fide labor organization in a particular unit of its choice as “artificial,” where there is nothing in such attempt or in such choice which would operate to establish the unit as inappropriate—i.e., one which would not result in proper bargaining. If the tool room is appropriate for bargaining purposes, the fact that the organization has enrolled unskilled and non-technical employees into a separate organization is no ones concern but that organization’s. The physical factors of appropriateness, such as mutuality of interests, skill, history, bargaining and the like remain unaffected, in fact are respected by the organizational plan of the I. A. M.

Even worse is the Board’s attempt to invoke an estoppel doctrine as against a bona fide labor organization. What relevancy to the establishment of a unit or units appropriate for collective bargaining purposes is there in the fact that the I. A. M. proceeded to organize in part on a craft and in part on an industrial basis in competition with another organization which was choosing to bargain entirely on an industrial basis? Does the fact of rivalry or competition make the craft unit any less or more appropriate? The theory on which the I. A. M. has proceeded is that it is a more appropriate method of bargaining to deal with craft workers on a craft basis, and with production workers on a production basis. Such a method gives less chance for internal disputes, and the mutuality of interests lead to a more harmonious relationship. The Board, however, has chosen to completely ignore this claim. By exercising its

prerogative to organize in the way experience has taught it is best, the I. A. M. is said to have estopped itself from claiming the unit, merely because another organization happens to be organizing on a basis embracing both of the I. A. M.'s proposed units. A more ridiculous stand or one less consistent with the purposes of the Act is difficult to imagine. It is submitted that the Board's action in refusing to prescribe the unit contended for by the I. A. M. or at least in refusing to hold an election in order to determine what the choice of the employees is as to representation, is arbitrary and unlawful.

Further, even if by any stretch of the imagination the I. A. M.'s policy of organization could be deemed artificial, why should this operate to deprive the *tool room employees* of a chance to obtain a craft affiliation, which a majority did voluntarily do? The employees are in no way responsible for the I. A. M.'s method of organizing. Should the employees be thereby deprived of their choice?

It may be mentioned in passing that the Board itself must have been wary or skeptical concerning the validity of this stated reason for refusing to designate the unit requested by the I. A. M. and designating a unit consisting of the entire production department including the tool room. If not, why did it go to the great trouble of describing in detail the various alleged unfair practices of the employer concerning the tool room employees and why did it find that the tool room employees had been interfered with in the exercise of their free choice? If this second reason advanced by the Board is legitimate then it becomes entirely irrelevant what the activities of the employer in the tool room were. The Board could have saved itself a good deal of trouble by merely stating that the unit contended for by the I. A. M. was artificial and that it had estopped itself from so claiming. It is significant that it did not.

V.

THE BOARD ERRED IN ORDERING THE EMPLOYER TO DEAL EXCLUSIVELY WITH AN ORGANIZATION WHICH HAD LOST ITS MAJORITY MEMBERSHIP SINCE THE HEARINGS BY REASON OF A VOLUNTARY SHIFT IN AFFILIATION UNAFFFECTED BY ANY ACT OF THE EMPLOYER, WHICH FACT WAS MADE KNOWN TO THE BOARD PRIOR TO ITS DECISION.

It is submitted that the Board has erred in ignoring the existing status of representation among employees of the Serrick Corporation, in ordering the employer to bargain exclusively with an organization which no longer represents a majority, and in refusing to conduct an election as expected and requested. The present argument relates to and challenges Sections 1(e) and 2(g) (5) of the Board's order.

The fact that a change in representation among the employees of the Serrick Corporation had occurred—that a large body of employees had switched their affiliations from the U. A. W. to the I. A. M. during the long interval between the hearing on the case and the issuance of the decision—was brought to the attention of the Board prior to the issuance of its decision. The Board ignored the information.

The question raised is a practical one, particularly in view of the long period of time which customarily elapses between the filing of charges and the issuance of a decision in a contested case. Is the mere filing of charges under Section 10 of the National Labor Relations Act, and the issuing of a complaint thereunder, to be held to crystallize the employer-employee relationship as to the time of the alleged unfair labor practices, and are the employees to be forestalled from exercising their right of selecting a representative of their own choosing and prevented from chang-

ing their affiliation, even in the face of a considerable lapse of time?

A. Events Involving Change in Affiliation. Parties Expected an Election Would be Held.

A brief review of the facts involved in this change of representative among the production employees outside of the tool room and in respect to the Board's error in refusing to conduct an election as was expected, is as follows:

Prior to its decision and prior to the hearings on the complaint, but during the pendency of the proceedings, the U. A. W. had instituted a strike which the Company had sought to enjoin before Judge Guthrie of the Dover County Circuit Court. This injunction suit was settled by Judge Guthrie's suggestion—by which the parties entered into an agreement dated September 3, 1937, in which the U. A. W. promised to return its members to work and to maintain the status quo of the company pending an election by the Board to determine representation. All parties to the Board's proceeding expected at this time that this election would be held.

On July 6, 1938, prior to the decision in this case the U. A. W. instituted another strike which was terminated by the Company a few days later by giving the U. A. W. a contract recognizing it as the exclusive bargaining agent for the Production Workers, exclusive of the Tool Room employees. The I. A. M. had long previously notified the Company that there had been a very considerable shift in membership in the Production Department from the U. A. W. to the I. A. M. since the time of hearing before the Trial Examiner, and that the I. A. M. represented a large majority of the Production Workers. Immediately after the Company had entered into this July 15th contract the I. A. M. issued a vigorous protest to the Board against this unwarranted and unlawful disruption of the status quo prior to the

decision and against this deprivation of the right of the I. A. M. to be the exclusive bargaining agent. This was done by telegram dated July 20, sent to the Board and by a verified statement or affidavit sent to the Board on July 23, subscribed and sworn to by Mr. C. F. McDonald, Grand Lodge representative of the I. A. M. in which Mr. McDonald stated that of his own knowledge the I. A. M. represented a large majority of the production workers. Further the I. A. M. requested the writer of this brief as its counsel to protest this high-handed procedure of the Company and the U. A. W., and on July 22nd another letter of protest was dispatched to the Board. (R. pg. 13). In this letter it was stated that the I. A. M. represented 100% of the Tool Room employees, and 90% of the Production Workers, representing a considerable increase in membership in the Production Department since the time of hearing. The Board was formally requested to hold an election in accordance with the intention of the parties and in accordance with Judge Guthrie's agreement of September 3rd.

This, as we have shown, the Board refused to do, but instead ordered the company to deal with the U. A. W., an organization at that time representing but a small minority of the employees. No reason was advanced by the Board for refusing to consider petitioner's request.

Presumably, however, the reason for ordering the Company to deal with the U. A. W. was a desire to establish a previous existing status quo. That is its explanation in the ordinary case of the unfair practice of refusing to bargain, and its reason in the ordinary case may be a legitimate one. However, where a change has occurred by reason of circumstances entirely outside of the employers control which is not the result of any unfair practices on the part of the employer, then the Board cannot artificially restore a status quo in deprivation of the wishes of the employees.

To begin with it is not even a valid assumption that the U. A. W. did in fact represent a majority in the Production Department at the time of the hearing. It is true that a stipulation was entered into between the parties (R. 491) in which it was stated that the U. A. W. as of the 15th day of October, 1937, had 471 signed application cards, the I. A. M. at 298 signed application cards, *exclusive of the tool room, and polishing and buffing department*, and that included in said applications were 91 persons who signed application cards in both organizations, and that there were a total of 673 employees employed in the plant on that date, exclusive of the tool room and polishing and buffing department. However, this stipulation was entered into for the purpose of avoiding any delay that would arise from checking and rechecking the cards, and it was stipulated only that the parties could present the cards that each claimed, not that the cards were genuine or would be determinative of the issue concerning representation. Both sides believed that the other had secured its membership improperly, and for that reason it was distinctly understood that an election would be held to settle the controversy respecting representation. It should be noted that the stipulation refers only to signed cards and does not state that either had a majority representation. The agreement before Judge Guthrie seemed to them binding, and they at all times expected an election to be held (R. 225, 312, 431, 441).

B. In So Far as the Change of Representation Is the Result of the Free Exercise of Choice on the Part of the Workers Themselves, the Board Has No Power to Order a Return to the Status Quo. If the Circumstances of the Change Are Controverted, a Hearing Should be Held.

In the present case the petitioners claim, and it is the fact, that a large number of the Serrick employees voluntarily,

without coercion or interference on the part of the employer, changed their affiliation after the time of the hearing. The best possible proof that the change of affiliation did result without the assistance of the employer lies in the fact that the employer entered into a collective bargaining contract with the U. A. W. for all the production workers, on July 15, 1938, in which the U. A. W. was recognized as exclusive bargaining agent, in spite of the I. A. M.'s claim to a majority, and in spite of the fact that the company had previously been notified of this claim and been requested to deal with the I. A. M. if any one. There is no evidence nor any present claim that the majority of the employees in the production department were coerced into joining the I. A. M. so as to give it a majority. If there is any such claim we merely ask that a hearing be held on the question.

As before stated the Board probably relies on its desire to restore a status quo, as its reason for its action in the present case. However, the Board forgets that it has power to restore a "status quo" only so far as this "status quo" has been altered by an employer's unfair tactics. In the present case petitioner claims, and it is a fact which it should at least be permitted to establish at a hearing, that it represents a majority of the employees who have become affiliated of their own free choice, free from coercion of any kind on the part of the employer, and in no way the result of the practices complained of in the original complaint. A majority of the Serrick employees have simply changed their minds as to their choice of a representative, an occurrence not infrequent in this day of competitive unionism. Any attempt to restore a previous status quo must and can be made only so far as is consistent with existing facts brought to the Board's attention, and as is consistent with the purposes of the restoration, which is solely to remove the effect of the unfair labor practices of the em-

ployer and to prevent the employer from benefiting from his unlawful acts. Accordingly, the most important consideration is: What caused the change? The Board could not, for instance, presently order an employer to deal with a representative no longer in existence (many unions have dissolved in less time than the Board took to decide this case), or it could not order an employer to deal exclusively with a past majority, when that majority no longer exists, its members having been destroyed in some disaster, to use an extreme example, or where a large portion of the employees had left the plant for more remunerative employment elsewhere. Similarly in the present case the Board cannot order the employer to deal with a representative which has lost its majority by reason of a circumstance as equally removed from the employer's control as is a disaster or as a quitting of employment, to wit, a voluntary changing of mind on the part of the employees. In the last analysis, the Board is here trying to restore what amounts to a previous mental condition of the employees—their desire and choice of a representative—something which has nothing whatsoever to do with requiring the employer to comply with the National Labor Relations Act. Here the Board, by its order, Secs. 1 (e) and 2 (9) (5) does not remedy something unlawfully done by an employer. Rather it is requiring the employees, against their will, to restore a mental condition existing many months previous to the order.

The rule regarding the restoration of "status quo" is artificial enough without attempting to branch into the metaphysical and restore conditions of mind. The rule is particularly difficult to apply in the case of an employer's unfair practice of refusing to bargain, especially after a lengthy elapse of time between the commission of the practice and the final order. That which determines an employer's duty to bargain and the employees' right to a representative depends on too many considerations outside

of the employer's control for the Board to be able to apply dogmatic principles. To bargain exclusively is not a single act remedied by a single performance on the part of the employer. It calls for a continued course of conduct by the employer.

C. The Board Has Not Followed Applicable Equitable Principles

In restoring a *status quo* and in otherwise attempting to effectuate the policies of the Act, the Board performs functions and issues decrees similar to those of a court of equity. Its actions should accordingly be governed by equitable principles. Although equity as well as the law may often resort to artificialities in order to proximate a just adjustment, it will not do so to an extent which flouts common sense, or which has the antithetical effect of denying justice. Familiar equity principles, such as the doctrine of impossibility in rescission of contracts, the refusal in specific performance actions to require the purchase of a unique chattel which has been destroyed, the principle that equity will not do that which cannot be done, and, finally, the principle that equity will not require a performance which inflicts undue hardships upon third persons, all indicate that in situations similar or analogous to the present one, equity would not require performance in the manner here required of the employer.

A very excellent common law analogy is given by the law of duress. Where contracts have been obtained under duress, the courts do not try to probe into the subjective intention of the parties, to restore previous conditions of mind by attempting to make for the parties the contract that would have resulted but for the duress. The courts merely set aside the contract. In the present case, the Board in attempting to restore a previous condition of mind, has attempted to determine subjective intent.

Common law analogies persuade that the Board has here misconstrued its power.

D. The Board Disregards Express Provisions of the Act.

Further, it would seem that the Board has disregarded the provisions of the Act itself in attempting to make its present order compelling the employer to deal only with the U. A. W., for by so doing it violates Sections 7, 9 (a) and 8(5) of the Act. Under Section 7 employees are guaranteed the right to freely choose their own representatives; under Section 9 (a) such representative shall be the exclusive bargaining agent. Section 7 carries the concomitant right of employees to change their choice once it has been made, it is the very essence of the provision that employees can freely exercise their right to choice of a representative. As stated by the Board itself in the Matter of *Jefferson Electric Company and United Electrical Workers of America*, C. 336, 8 N. L. R. B. No. 33, "The Act guarantees to employees the freedom to choose representatives, and this freedom involves the liberty to change representatives". In the present case the Board, by ordering the employer to deal only with the U. A. W., has gone counter to the desires of a large majority of the employees, directly contrary to Section 7 and Section 9 (a). Again, the Board compels the employer to commit what is an unfair practice under Section 8(5). Section 8(5) requires an employer to deal exclusively only with the representative chosen by a majority. If an actual majority exists, which the employer does not recognize, but deals instead with a minority, then he is subject to charges under 8(5).

It cannot be claimed by the Board that, by their effort to restore a *status quo* in entire disregard of the present existing situation, it is effectuating the policies of the Act. If the policies of the Act are to foster collective bargaining, to protect employees in the free exercise of their right to

choose their own representative, and, most important, to secure peace and harmony in industrial relations, this order in opposition of the wishes of a large majority of the employees will have an effect directly the opposite. One of the principal accomplishments of the Act was to provide a democratic process whereby organizational strife could be eliminated after a majority had agreed on a choice of representative. The Board has completely lost sight of the objections of the Act in thus disregarding present conditions in the plant.

It is submitted that this Court has power to grant petitioners' request for a hearing on the question of representation prior to the Board's certifying the U. A. W. as exclusive bargaining representative, under Sec. 10(e) of the Act and to set aside that particular order until the hearing has been held.

E. The Remington-Rand and Fansteel Cases Are Controlling.

Two cases, one decided by the U. S. Supreme Court and the other by the Circuit Court of Appeals for the Second Circuit, are completely determinative of the issues here presented. In *N. L. R. B. v. Remington-Rand*, 94 Fed. (2d) 862, the Board had ordered the Remington-Rand Company, employer, to deal exclusively with a Joint Board, a labor organization which had brought the unfair labor practice charges involved in the case. However, a considerable period of time had elapsed between the hearing and the decision, and the court directed the Board to take into consideration the fact that merely two years had elapsed; that new circumstances may have entered, and most important, that the employees may have changed their minds. The court said:

"Section I(d), in so far as it merely compels the respondent to treat with the Joint Board, is within the

language of Sec. 8(5), and was plainly warranted. However, that was nearly two years ago, and it is possible that the Joint Board will no longer represent a majority of the men, even after those who struck are restored to their jobs, as later sections of the order provide. The membership of a union is constantly changing and it may at any time cease to represent the majority; if it does, it loses its power to bargain for the unit. When the authority of the representatives is in doubt, the Board must inquire and certify under Sec. 9(c) that their authority exists, or its order will be without support in the evidence. In the case at bar we could not in any event judge of the Joint Board's continued authority until the old men are reinstated, which the Labor Board has required—lawfully as we shall show later; and even after that has been done, it will still be impossible to judge, for not only will there have been many changes in personnel, but the men may not be of the same mind. Yet the order in form requires the respondent to recognize the Joint Board indefinitely in the future, and if that really assured them of a perpetual tenure, it would be objectionable for the reasons just given. It does not. Practically, the issue will arise only when there is a new occasion for negotiation, and the Joint Board demands renewed recognition as bargaining agent of the unit. Our order must not then guaranty their power, if it shall appear that they have lost it; but yet it should give them some presumptive authority, for otherwise the act will not be workable. They will be the last representatives; and the respondent must challenge their power for this reason in good faith, and it must invoke an inquiry by the Labor Board under Sec. 9(c), if it does not treat with them. But if it does so, we shall not treat its refusal as a contempt, until after the Labor Board has certified the result. It will not be necessary to insert this proviso in the order; it is to be understood as incorporated into it."

In National Labor Relations Board v. Fansteel Metallurgical Corporation, decided by U. S. Supreme Court, February

27, 1939, the Board had ordered the employer to deal exclusively with the union which had brought the charges. There again the Supreme Court required the Board to take into consideration a change in circumstances which affected representation. The Court stated:

“Respondent resumed work about March 12, 1937. The Board’s order was made on March 14, 1938. In view of the change in the situation by reason of the valid discharge of the ‘sit-down’ strikers and the filling of positions with new men, we see no basis for a conclusion that after the resumption of work Lodge 66 was the choice of a majority of respondent’s employees for the purpose of collective bargaining. The Board’s order properly requires respondent to desist from interfering in any manner with its employees in the exercise of their right to self-organization and to bargain collectively through representatives of their own choosing. But it is a different matter to require respondent to treat Lodge 66 in the altered circumstances as such a representative. If it is contended that Lodge 66 is the choice of the employees, the Board has abundant authority to settle the question by requiring an election.”

It is submitted that the above two decisions are decisive of the present case. Here circumstance entirely beyond the employer’s control, and not resulting from his unfair labor practices, have occasioned a change in representation. In such a case, as stated by the Supreme Court, the Board has abundant authority to settle the question by requiring an election. In the present case such an election had been formally requested prior to the Board’s decision.

The Board will probably rely upon the case of *N. L. R. B. v. Louisville Refining Company*, decided March 10, 1939, by the Circuit Court of Appeals for the Sixth Circuit. In that case, which involved charges of unfair labor practices

and discriminatory discharges, a paper purporting to have been signed by fifty-three of the company's employees was filed with the Board during the hearings, asking for a discontinuance of the proceedings. None of the men who signed the paper appeared or testified as to the facts set forth therein, and no evidence was given as to the circumstances under which the paper was secured. The Court disregarded this paper as in no way affecting the acts complained of. It does not appear that there was involved in this case any question of representation concerning a shift in affiliation; the 53 employees merely asked the Board to discontinue the proceedings, and this was done during the proceedings. Further, it should be noted that the Court merely declared that an order of the Board "*lawful when made*" does not become moot because change in circumstances indicates that the need for it may later be less. In the present case we deny that the Board's order was *lawful when made*.

In *N. L. R. B. v. Penn. Greyhound Lines*, 303 U. S. 261, cited by the Court in the Louisville Refining Company case, the Board had ordered the employer to cease recognizing the company union. Subsequent to its order the Board had certified a legitimate labor organization as representative of the company's employees. When the case came before the Court the company contended that the question of whether the Board had power to compel withdrawal of recognition was moot because of the subsequent certification of the legitimate labor organization. It was merely in that connection that the Court stated:

"An order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changed circumstances indicate that the need for it may be less than when made."

The Board seems to take the position in its answer that the facts in regard to the change in circumstances should

have been presented to the Board in a more formal fashion, i.e., by a petition for certifications under (9(c)) on the form drawn up by the Board. It is submitted that the manner in which the information was brought to the Board's attention is entirely immaterial. The essential fact is that the Board is made aware of a change in circumstances which might affect the making of a proposed order. The least it could do would be to investigate the truth or fact of the matter alleged. In cases where courts have dismissed proceedings because the dispute has become moot it makes no difference how knowledge of the facts making the dispute moot is brought to the Court's attention. If there is no dispute concerning these facts, then the court denies them in the consideration; if there is a dispute, it will order a hearing on this question. Further it is to be noted that in the Remington-Rand and Fansteel cases no point was made of how the knowledge of the subsequent developments was brought to the attention of either the Court or the Board. While it may be that under its rules the Board could not proceed to a hearing under Section 9 of the Act without any more formal request, it does not follow that the Board has power to make an order affirmatively directing the employer to deal with an organization which it is claimed no longer represents a majority.

In order to avoid misunderstanding concerning the argument here made our position is not that the Board should not attempt to remedy the unfair practices of the employer, assuming they exist, as far as possible. Petitioners merely submit that it should not enter an order requiring the employer to deal with the U. A. W. All other provisions of the Board's decision and order, such as requiring the employer to cease and desist from its various practices, reinstate discriminatorily discharged employees, etc., would still be made and it can be likewise ordered that the em-

ployer cease and desist from refusing to bargain with whatever representative is chosen by the majority, such majority to be designated in a Board election conducted at such time as the Board shall direct, and in which time the effect of the unfair practices will have abated. If the Board does not wish to conduct any further hearings on the question of representation, then it cannot order the employer to deal with the U. A. W., in view of the facts brought to its attention. It is submitted that that portion of the Board's order (Sec. 1(e), Sec. 2(g) (5)) requiring the employer to deal exclusively with the U. A. W. is unlawful and contrary to the purposes and policies of the Act.

Conclusion.

It is respectfully submitted that the Board's decision and order insofar as it finds:

1. That the I. A. M. did not represent an uncoerced majority on either August 6th or August 11th and that the I. A. M. had been assisted by the employer in obtaining its majority, and that therefore the contract of August 6 was invalid;

2. That the tool room employees did not constitute an appropriate unit for collective bargaining, or in refusing to hold an election to ascertain the choice of the tool and die makers in this respect;

3. That the employer is required to deal exclusively with the U. A. W. as representative of all production workers, ignoring the claims of the I. A. M. that it represented a majority in the production department and refusing to conduct an election

is erroneous and contrary to the purpose and policy of the Act.

Respectfully submitted,

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Dated at Washington, D. C., April 27, 1939.

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Joseph W. Stewart

No. 7258—Special Calendar

CLERK

In the United States Court of Appeals for the
District of Columbia

APRIL TERM, 1938

INTERNATIONAL ASSOCIATION OF MACHINISTS, TOOL & DIE
MAKERS LODGE NO. 35, AFFILIATED WITH THE INTERNA-
TIONAL ASSOCIATION OF MACHINISTS, AND PRODUCTION
LODGE NO. 1200, AFFILIATED WITH THE INTERNATIONAL
ASSOCIATION OF MACHINISTS, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

*ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

This case is before the Court upon a petition by the International Association of Machinists, a labor organization, and its two local affiliates, Tool and Die Makers Lodge No. 35, and Production Lodge No. 1200, under Section 10 (f) of the National Labor Relations Act (40 Stat. 449, c. 372, U. S. C., Supp. II, Title 29, sec. 151 *et seq.*), to review and set aside certain portions of an order of the Board issued against the Serrick Corporation pursuant to Section 10 (c) of the Act.

STATEMENT OF THE CASE

Proceedings before the Board

Charges and amended charges (R. 454-459) having been filed by the United Automobile Workers of America, Local

No. 459, a labor organization (hereinafter called the U. A. W. A.), the Board, by its Regional Director at Indianapolis, Indiana, issued its complaint against the Serrick Corporation on October 5, 1937 (R. 447-453). Copies of the complaint, together with notices of a hearing thereon (R. 453-454), were served upon the Serrick Corporation (hereinafter called the Company), upon the U. A. W. A., and upon the International Association of Machinists, petitioner herein (hereinafter called the I. A. M.) (R. 459-460). In so far as is here material, the complaint, as thereafter amended (R. 468-469, 481, 493-499), in addition to jurisdictional allegations, alleged (a) that the Company, by threats and other acts had, in violation of Section 8 (1), interfered with the rights of its employees freely to choose representatives for collective bargaining purposes; (b) that the Company in violation of Section 8 (3) had discharged certain named toolroom employees because of their failure to become members of the I. A. M.; and (c) that on and after August 10, 1937, the Company, in violation of Section 8 (5), had refused to bargain collectively with the U. A. W. A., although that organization represented a majority of its employees in an appropriate unit consisting of all of its employees excepting the buffers and metal polishers, foremen, supervisory officials, and office employees engaged in clerical work.¹ On October

¹ In addition, the Board's complaint alleged that the Company had dominated and supported a labor organization known as the Acme Welfare Association, and had discharged certain of its production employees because of their U. A. W. A. membership and activity, and that by these acts had engaged in unfair labor practices in violation of Section 8 (1), (2), and (3) of the Act (R. 440-449, 451). The Board's decision sustained these allegations of the complaint (R. 673-

15, 1937, the Company filed an answer, in which, as amended at the hearing, it admitted the jurisdictional allegations but denied that it had committed any of the alleged unfair labor practices. As an affirmative defense, the Company, admitting that it had discharged the named toolroom employees because they refused to join the I. A. M. alleged that the discharges were lawfully made pursuant to a closed-shop contract entered into with the I. A. M. on or about August 6, 1937, covering the employees in its toolroom.

On August 19, 1937, following the filing of the charges by the U. A. W. A. which resulted in the issuance of the complaint, the U. A. W. A. also filed a petition under

675, 686-688), except as to some of the production employees alleged to have been discriminatorily discharged (R. 448-449, 670, 686-687), and the Board's order required the Company to cease recognizing or dealing with the Acme Welfare Association, and insofar as the Company had failed to reinstate with back pay the production workers found to have been discriminatorily discharged, it affirmatively directed the Company so to do, and to post appropriate notices (R. 699, 700-701).

These findings and parts of the order are not here in issue. Petitioners have stipulated that these findings and parts of the order "are amply supported by substantial and competent evidence and are reasonable in light of the whole record" (R. 728). Petitioners, as more fully stated hereinafter (*infra*, pp. 7-8), take issue only with the findings and parts of the order arising out of the portions of the complaint set out above in the text. For a full understanding of the findings and parts of the order which petitioners here put in issue, it will be necessary at the appropriate places in the discussion in this brief to refer to the uncontested findings. The Company against which the order was issued is not a party to this proceeding and has not challenged the findings and order in this case in any part, but on the contrary has reported that it has complied and will fully comply with all its terms (R. 703-709).

Section 9 (c) of the Act for the investigation and certification of representatives (R. 462-463). As amended September 27, 1937, the petition alleged that the unit appropriate for collective bargaining purposes consisted of all of the Company's employees exclusive only of the buffers and metal polishers, foremen, supervisory officials, and office employees engaged in clerical work. The petition requested the Board to investigate and certify the representative entitled to bargain collectively on behalf of the employees. The Board, on September 27, directed such investigation to be held and consolidated the petition for purposes of hearing with the case arising out of the charges of unfair labor practices filed by the U. A. W. A. (R. 465-466). On October 14, 1937, the I. A. M. was granted leave to intervene (R. 467).

With notice to all parties, a hearing on the consolidated cases was held in Muncie, Indiana, from October 18 through November 15, 1937, before a Trial Examiner of the Board (R. 670). The Company and the U. A. W. A. were represented by counsel, and the I. A. M. by its Grand Lodge representatives. All participated in the hearing.

On March 4, 1938, the Trial Examiner filed an Intermediate Report (R. 641-664) in which he found that the Company had engaged in and was engaging in part of the unfair labor practices alleged (R. 645-648, 656-661, 662), but insofar as is here material recommended dismissal of that part of the complaint which alleged as violative of Section 8 (3) the discharge of the named toolroom employees for their refusal to join the I. A. M., on the ground that the closed shop contract between the Company and the I. A. M. constituted a valid defense (R. 648-652, 664).

The U. A. W. A. filed exceptions to the Intermediate Report (R. 664-665). Although advised of their right so to do (R. 666), none of the parties applied for oral argument before the Board or for permission to file briefs. On July 27, 1938, the Board rendered its decision setting forth its findings of fact, conclusions of law, and order (R. 667-702).

The Board's decision and order

The findings of fact, conclusions of law, and order of the Board which are here pertinent are, in brief, as follows (R. 675-701):

1. *The unfair labor practices* (R. 673-696).—The Company's discharge of 18 toolroom employees because of their failure to join the I. A. M., violated Section 8 (3) of the Act for the reason that the closed-shop contract pursuant to which the discharges occurred was illegal under Section 8 (3) in that (a) it was made with a labor organization "assisted" by unfair labor practices, and (b) the toolroom, the unit covered by the contract, was not an appropriate collective bargaining unit under the circumstances of this case (R. 675-686). On and at all times after August 10, 1937, the Company refused to bargain collectively with the U. A. W. A. as the representative of its employees in the appropriate unit although the U. A. W. A. represented a majority of such employees. That unit, the Board found, consisted of all of the employees at the Company's Muncie plant, including toolroom employees, but excluding buffers and polishers, supervisory, and office employees engaged in clerical work (R. 688-695). The Company, by assisting the I. A. M. and opposing the U. A. W. A., and

by other acts, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act (R. 695-696). By all of the foregoing acts, the Company has engaged and is engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1), (3), and (5), and Section 2 (6) and (7) of the Act (R. 697-698).

2. *The order* (R. 698-702).—In addition to requiring the Company to cease from discouraging membership in the U. A. W. A. or encouraging membership in the I. A. M. by discharge or any other manner of discrimination and from urging, persuading, warning, or coercing its employees to join the I. A. M. and, affirmatively, to reinstate to their former positions with back pay the toolroom employees found to have been discriminatorily discharged pursuant to the illegal closed-shop contract, and to post appropriate notices, the Board ordered the Company to cease and desist (1) from giving effect to its closed-shop contract with the I. A. M., provided, however, that the Company is not precluded thereafter from entering into such a contract with the I. A. M. or any other labor organization if such labor organization is the authorized representative of the employees in an appropriate unit as provided in Section 9 (a) of the Act and has not been assisted by any unfair labor practices; and (2) from refusing to bargain collectively with the U. A. W. A. as the exclusive representative of its employees in the unit found by the Board to be appropriate.

Having found as part of the complaint case that the U. A. W. A. was the representative of the employees in the appropriate unit, the Board found it unnecessary to con-

sider separately the petition filed by the U. A. W. A. for certification of representatives, and, accordingly, dismissed it (R. 697).

THE CONTESTED ISSUES

The Company, against which the Board's order in this case was issued, does not challenge the jurisdiction of the Board over it,² or contest in any part the validity or propriety of the Board's findings of fact, conclusions of law, and order. On the contrary, the Company has reported, as required by the order (R. 701, paragraph 2 (i)), that it has complied and will fully comply with its terms (R. 703-709). The sole questions, therefore, presented to the Court for consideration are the limited ones arising from the claims made by petitioners herein. Those claims (R. 7) are directed only to paragraphs 1 (d) and 1 (e) of the order which, respectively, require the Company to cease and desist (1) from giving effect to its closed-shop contract

² The facts, based upon a stipulation between counsel at the hearing (R. 478-481) and undisputed by petitioners herein (R. 671-672, 728) show that the Company is engaged at its plant in Muncie, Indiana, in the manufacture of bolts, screws, automobile moldings, refrigerator parts, and stenotype machines. The principal raw material used by the Company is steel of which, during the first 10 months of 1937 it consumed an amount valued between \$600,000 and \$800,000. During the first 6 months of that year \$400,000 worth of the steel used came from outside the State of Indiana. Its products during the same period were valued at \$600,000 of which 70 percent was shipped directly to consumers outside the State of Indiana. These facts establish the applicability of the Act to the Company. *National Labor Relations Board v. Jones & Laughlin*, 301 U. S. 1 and companion cases; *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453; *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197; *National Labor Relations Board v. Fainblatt*, 59 S. Ct. 668.

with the I. A. M. (R. 699), and (2) from refusing to bargain collectively with the U. A. W. A. as the exclusive representative of its employees in the unit found to be appropriate (*Ibid.*).³ The contention as to paragraph 1 (d) of the order is that the Board's finding that the closed-shop contract was invalid, as failing to comply with the conditions required by the proviso of Section 8 (3), is not supported by the evidence (Pet. Brief, pp. 5-6). The contention as to paragraph 1 (e) of the order is that the Board's holding as to the unit appropriate for collective bargaining was not correct in that the Board upon the record should have excluded the toolroom employees therefrom, and, in addition, that the Board should have ordered an election to be held both as to the toolroom and as to the other production employees (Pet. Brief, p. 6). Petitioners do not in any other respect challenge the Board's order, and have stipulated that the facts and inferences upon which all other parts of the order are based "are amply supported by substantial and competent evidence and are reasonable in light of the whole record" (R. 728). Petitioners agree further that "in the proceedings before the Board" they "were afforded their full rights and privileges in regard to notice, hearing, and all other matters of procedure" (R. 730). Accordingly, addressing ourselves to the parts of the order challenged, we submit that the findings upon which they are based are fully supported by substantial evidence, and that they are wholly valid and proper under the Act.

³ These claims are, of course, directed as well to paragraphs 2 (g) (4) and 2 (g) (5) requiring the Company to post notices that it will cease and desist as ordered in paragraphs 1 (d) and 1 (e).

ARGUMENT

POINT I

THE CLOSED-SHOP CONTRACT BETWEEN COMPANY AND THE I. A. M. IS NOT WITHIN THE PROVISIO TO SECTION 8 (3) OF THE ACT AND IS THEREFORE INVALID UNDER THAT SECTION ⁴

Under Section 8 (3) of the Act, it is an unfair labor practice for an employer to encourage or discourage membership in a labor organization by discrimination in regard to

⁴ Under Section 10 (e) of the Act, the Board's findings are conclusive if supported by "substantial" evidence; that is, such evidence as "a reasonable mind might accept as adequate to support a conclusion" (*Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 229), and which affords "a substantial basis of fact from which the fact in issue" was "reasonably inferred" by the Board (*National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 59 S. Ct. 501, 507). The findings in this case are entirely supported by such evidence and are, therefore, conclusive, for this Court will not "weigh the testimony" (*Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board*, 301 U. S. 142, 147) or exercise its own independent judgment as to facts found by the Board" (*National Labor Relations Board v. Louisville Refining Co.*, decided March 13, 1939 (C. C. A. 6). The test of substantiality is similar to that applied in a jury case in determining whether the evidence introduced is sufficient to justify the trial judge in refusing to direct a verdict when the conclusion sought to be drawn is one of fact for the jury. *Columbian Enameling case, supra*. And the Supreme Court has held that in determining a motion for a directed verdict not only will the court assume "that the evidence for the opposing party"—here the Board—"proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all of the inferences that are fairly deducible from them" (*Gunning v. Cooley*, 281 U. S. 90, 94; *Lumbra v. United States*, 290 U. S. 551, 553), but the court will withdraw the case from the jury only where "all reasonable men" would "draw the same conclusion" from the evidence. *Gardner v. Michigan Central R. Co.*, 150 U. S. 349, 361.

hire or tenure of employment. A closed-shop contract, which expressly requires such discrimination, is clearly invalid under this section unless it falls within the proviso thereto, which protects such contracts under certain express conditions. That proviso reads as follows:

Provided, That nothing in this Act * * * shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.⁵

The Board found in the instant case that the closed-shop contract concluded between the company and the I. A. M. did not satisfy either of the two conditions both of which are express prerequisites to operation of the proviso. The Board's findings show that the I. A. M. was a labor organization which had been assisted by unfair labor practices committed by the Company, and that the I. A. M. was not the representative of a majority of the employees in an appropriate collective bargaining unit. The evidence affords full support for the Board's findings in both respects.

⁵ The Senate Committee on Education and Labor pointed out, concerning this provision: "* * * the bill is extremely careful to forestall the making of closed-shop agreements with organizations that have been 'established, maintained, or assisted' by any action defined in the bill as an unfair labor practice" (Senate Report No. 573, 74th Cong., 1st Sess., page 12).

A. The I. A. M. was "assisted" by the company's unfair labor practices prior to execution of the closed-shop contract

The full significance of the activities by the company, designed to coerce its toolroom employees into joining the I. A. M., cannot be realized without a brief consideration of the similar activities which the company theretofore exercised on behalf of the Acme Welfare Association, a labor organization which is now conceded to have been company-dominated (R. 673-674, 728).

The initiation of the Company's systematic campaign to prevent U. A. W. A. organization by means of the company-dominated Association, which operated to destroy the free choice of the toolmen

The U. A. W. A. commenced its organizational campaign in the Company's plant in May 1937 (R. 676). The Company's personnel director, Lewis, who was also the president of the Acme Welfare Association, addressed a meeting held about June 1 and attended by between 200 and 300 employees (R. 674). It is conceded that Lewis warned the employees against what he termed the U. A. W. A. "invasion," that he threatened loss of privileges to the employees if the invasion was successful, and that he pleaded for cooperation to keep the U. A. W. A. out (R. 674, 676, 728; 59-60). He advised the governing committee of the Association that the U. A. W. A. meetings were under surveillance by the Company (R. 55, 676, 728), and, in addition, specifically advised one of the employees not to join the U. A. W. A. (R. 196). Other supervisory employees joined in the anti-U. A. W. A. campaign (R. 674, 728). Superintendent Stillwagon derided the U. A. W. A. and warned one of the employees who had posted a notice of meeting in

the plant that a repetition of the offense would result in his discharge (R. 657, 677, 729). It is conceded that the employee was thereafter discharged for his activity on behalf of the U. A. W. A. (R. 657-658, 674, 729). Various of the foremen solicited the employees to join the Association in preference to the U. A. W. A. (R. 674, 728).

Of particular significance in relation to the Company's subsequent similar campaign on behalf of the I. A. M. is the activity of the toolroom supervisors, who took part in both this and the subsequent solicitation. Walter Fouts, a toolroom supervisor, urged the men there employed to join the Association in order to defeat the U. A. W. A. (R. 674, 728). Supervisor Shock warned two of the toolmen that the Company would close its plant rather than deal with that organization (R. 61, 234, 236-237, 678, 679). Foreman McCoy, head of the toolroom, not only granted permission for Association solicitation, but expressed his opinion that the Company had "to do something", since if the U. A. W. A. came into the plant "the place will go to hell" (R. 678, 728). It is conceded that during this period in June four U. A. W. A. members were discharged by the Company as "part of a systematic campaign" to prevent organization by the U. A. W. A. (R. 656-659, 686, 729).

The failure of the Association and the Company's resort to the I. A. M.

By mid-July it became evident to the management that the Association which it was sponsoring and supporting as a means of combating the U. A. W. A. was a failure (R. 674, 728). The Company thereupon was instrumental in bringing the I. A. M. into the plant and promptly threw

its support to the I. A. M. by making it clear to the employees that it was in their best interest to join that organization in preference to the U. A. W. A.

The introduction of the I. A. M. into the plant by the Company's supervisors and the misleading character of the "straw vote"

The same toolroom supervisors who were so active on behalf of the Association prior to its collapse took the initiative in introducing the I. A. M. into the plant. Sometime between July 15 and July 20, Supervisor Fouts, accompanied by two other employees, Byroad⁶ and Baker, approached Supervisor Shock with the proposal to bring the I. A. M. into the toolroom. When Shock agreed to cooperate, it was decided to get the employees to "go along" by conducting a "straw vote" among them (R. 348, 365, 397). The way in which this vote was conducted demonstrates that it was purely a device to engineer interest in the I. A. M., not a *bona fide* test of employee sentiment. Byroad testified that he walked through the toolroom during working hours, without any list of the employees against which to check, and without requesting the signatures of any of the voters or even noting their names. He merely made "tally marks, and then I added up the marks that was down on the paper" (R. 425). Byroad apparently also selected those he would ask to vote: the third shift was not polled at all, and many of the men working on the other shifts did not even hear of the voting (R. 73). Those who were attempting to bring the I. A. M. into the plant made good use of this entirely untrustworthy poll. It was announced that 80 percent of the

⁶ Byroad is also referred to in the record as Birod.

toolmen were in favor of the I. A. M. (R. 365-366, 396-398, 413). Yet after its formation the I. A. M. local could muster but a scant majority, for as late as August 10, only 55 percent of the toolmen had joined (R. 491). The plain inference is that the toolmen were deliberately misled into believing that an overwhelming majority favored the I. A. M. Supervisors Fouts and Shock thereupon instructed Byroad to communicate with McDonald, an I. A. M. organizer, during working hours (R. 348-349). Foreman McCoy, head of the toolroom, was advised that Byroad was leaving the plant, but manifested no curiosity as to where he was going (Tr. 3002). On the night of July 28, McDonald held an organization meeting at which 34 of the 63 toolroom employees signed I. A. M. application cards (R. 349, 398, 487-490).

The evidence establishes, therefore, that the Company, through Fouts and Shock, its supervisors, turned its efforts from forcing the Association upon the employees, to the introduction of the I. A. M. into the toolroom as a rival of the U. A. W. A., which the Company was determined to destroy. The testimony of Floyd Stevenson, one of the toolroom employees, sums up what occurred. Stevenson testified that Supervisor Fouts "told me he would like for me to get into the company union just to beat the C. I. O., and * * * later on then, when he seen that was not going to do he tried to get me to join the A. F. of L. for the same reason, just to beat the C. I. O." (R. 98). This finds abundant support in the record. Witmer, a toolman, testified that, before the I. A. M. meeting, Fouts stated "he had attempted to contact and did contact an A. F. of

L. organizer who would come on from Indianapolis and would help them organize a local in Muncie" (R. 42). To rally support for the meeting Night Superintendent Shimer told one of the men that "Mr. Serrick would recognize an A. F. of L. but he would not recognize a C. I. O. union" (R. 74-75).⁷

The solicitation on behalf of the I. A. M. and against the U. A. W. A.

After thus introducing the I. A. M. into the toolroom, the Company, in clear violation of the Act's requirement that an employer maintain even-handed impartiality between competing labor organizations, threw the full weight of its influence into the I. A. M.'s drive for members. Supervisor Fouts solicited workman after workman in the toolroom to join the I. A. M. (R. 41-42, 56, 65, 90, 92, 98), stating that the purpose of his action was to "abolish any C. I. O. organization in the shop" (R. 42), to "beat" the U. A. W. A. (R. 98). Fouts did not conceal the Company's true purpose, to coerce the employees into the I. A. M. as a means of eliminating the U. A. W. A.

⁷ Although denied by Shimer, the denial was not credited by the Trial Examiner who saw and heard the witnesses (R. 651). The fact that Shimer, as he claimed, did not know Mr. Serrick personally at the time he made the statement is of no consequence. Shimer, as a Company superintendent, was fully in a position to be acquainted with the Company's policy in this matter, and his statement was clearly intended to reflect the view of the Company rather than any personal view of Mr. Serrick. Too, petitioner's contention (Pet. Br., p. 12) that the statement could not have been made until after the I. A. M. meeting held on July 28, not only controverts the direct testimony as to the time of its utterance, but also proceeds on the assumption that the I. A. M. movement did not begin until July 27, whereas in fact it was initiated by the supervisors at least as early as July 20 (*supra*, p. 13).

from the plant, and then to turn on the I. A. M. and destroy that organization. Plainly speaking as a representative of the management rather than as a member of a labor organization seeking to enlist others in its cause, Fouts told one employee that if he joined the I. A. M. but "did not want to stay, that would be all right, just as long as they got in enough to beat them [U. A. W. A.] out" (R. 98). He also threatened one employee with discharge unless he joined the I. A. M. (R. 90).

Supervisor Shock engaged in similar activity on behalf of the I. A. M. (R. 56, 90, 92, 120). Indeed, for a week preceding the company's execution of the closed-shop contract with the I. A. M. on August 11 "practically all" that Shock did "was go from one bench to another soliciting" (R. 120). A third supervisor in the toolroom, Dininger, prior to August 11, offered an employee a high efficiency rating if he would join the I. A. M. (R. 77). Bolander, another toolroom supervisor, in the latter part of July or the first week in August, permitted in his presence and during working hours, the use of his desk by an I. A. M. committeeman for the purpose of signing I. A. M. application cards (R. 99).

The Company's knowledge and full approval of the activity for the I. A. M.

The Company's higher officials knew of these activities by its supervisors. When, following the execution of the closed-shop contract, one of the toolmen pointed out to Personnel Director Lewis that "a lot of pressure" had been put on the men and that their jobs had been "threatened" (R. 43), Lewis, far from denying this, merely pointed out that the toolmen had acted "like a bunch of schoolboys"

(R. 44). McCoy, head of the toolroom, was present during the open solicitation by Fouts and Shock, but made no protest, although the activity was carried on while the men were supposed to be working (R. 41, 91). Indeed the solicitation by various employees in McCoy's presence was so widespread (R. 33, 37, 41, 43, 56, 64-65, 72-73, 79-80, 90, 96, 98-99, 101-102, 105, 114-115, 119, 233, 403) that his admission that he knew of it (R. 100, 259) is superfluous as is Byroad's statement that "Mack knows what I am doing" (R. 235).

The Company's simultaneous activity to prevent U. A. W. A. organization

The Company's campaign to force the I. A. M. upon the toolmen lasted over the whole period during the last two weeks of July and the first two weeks of August (R. 41). It was accompanied by an equally vigorous campaign to prevent the employees from joining the U. A. W. A. Night Superintendent Shimer threatened to discharge those who joined the U. A. W. A., and this threat was carried out in the case of one employee (R. 74-75, 677). Plant Manager Westlund admitted on the stand that he had denied the U. A. W. A. members the right to discuss union affairs on company property, and had ordered two toolroom employees to "check out their time" when he discovered them talking to a U. A. W. A. organizer (R. 320-321; see R. 45). If there was any doubt left in the minds of any of the employees as to where the Company's preference lay, the sharp differentiation between the treatment accorded the I. A. M. and the U. A. W. A. in their respective efforts to organize the toolroom removed such doubt.

The Company's responsibility for the activity of its supervisors

The foregoing activities by the Company would appear clearly to negative any showing that the I. A. M. was not "assisted" by the management, within the meaning of the proviso to Section 8 (3) of the Act (*supra*, p. 10). Petitioners contend, however, that the supervisory employees active in the solicitation, namely, Fouts, Shock, Bolander, and Dininger were not, in fact, supervisory employees (Pet. Br., pp. 17-24). It will be noted that the contention is not a complete answer, since it ignores the active part taken by men who were undoubtedly management representatives, such as the personnel director, the plant manager, the superintendents, and the head of the toolroom, in the campaign to establish the I. A. M. in the plant. In addition, the contention is entirely devoid of merit. Petitioner sets out certain facts in its brief which purport to show that Fouts himself did certain highly-specialized work. In addition, however, the record establishes that Fouts directed certain machinists at their work, that he had the power to decide whether a man was suitable or not suitable for a particular job, that he was in charge of the "roll department," and that the men regarded him as a "boss" (R. 42, 54, 89). The uncontroverted evidence establishes that Shock was in charge of the toolroom when its head, McCoy, was absent (R. 89, 90, 104, 120). It was Shock who instructed Byroad to inform the employees during working hours of the execution of the closed-shop contract with the I. A. M. (R. 358). Dininger and Bolander were referred to in the testimony as foremen (R. 73, 77, 99, 54), and McCoy admitted on the stand that they were in charge when he was absent (R. 309, 307). Person-

nel Director Lewis testified that Dininger and Bolander had the power to recommend employees for hire and discharge (R. 165).

The facts, therefore, leave no doubt of the Company's responsibility for the outstanding parts played by these men in the I. A. M. drive for membership. The absence of authority directly to hire or discharge "is immaterial" where, as here, other functions of supervisory employees establish their status as management representatives. *Virginia Ferry Co. v. National Labor Relations Board*, 101 F. (2d) 103, 105-106 (C. C. A. 4). What is of inescapable importance here in identifying the men with the management in the minds of the toolmen was both their authority to direct the work of the employees and their further power to recommend for hire or discharge (R 165). When the employer clothes supervisors with such powers it is only natural that the ordinary employees should look up to them as "bosses" and regard them as spokesmen for the management. The employer's responsibility for the actions of such supervisors is well settled under the Act. *National Labor Relations Board v. J. Freezer & Son, Inc.*, 95 F. (2d) 840 (C. C. A. 4); *National Labor Relations Board v. Wallace Manufacturing Co., Inc.*, 95 F. (2d) 818 (C. C. A. 4); *National Labor Relations Board v. The A. S. Abell Company*, 97 F. (2d) 951 (C. C. A. 4); *National Labor Relations Board v. American Potash & Chemical Corp.*, 98 F. (2d) 488 (C. C. A. 9), cert. den. 59 S. Ct. 582.⁸

⁸ The recognition given by the courts to the management status of supervisory employees is in entire agreement with the principles and practices upon which industrial relations are in fact conducted by employers. Authoritative studies in the field of industrial man-

Petitioners further contend (Pet. Br., p. 23) that these men were eligible to membership in the I. A. M. and had a right to engage in activities on its behalf whatever their status. However, the record establishes that the pressure exerted upon the employees, which included threats of discharge (*supra*, p. 20), was exerted by the supervisors as management representatives, not as employees soliciting on behalf of their union. The coercive activities of the supervisors so plainly countenanced by the management coupled with the Company's vigorous prevention of similar activities by the U. A. W. A. could have left no doubt on the part of the toolmen that the management approved of the activity of the supervisors and desired the men to join the I. A. M. Certainly it taxes credulity to believe that the very same men who, in the drive against the U. A. W. A. by means of the admittedly company-dom-

agement and personnel problems reveal that, strategically located at the normal point of contact between the management and the employees, the supervisor represents the management's views in the eyes of the employees and is the source from which employee opinion can be moulded. Metropolitan Life Insurance Co. Policyholders Service Bureau, *Foreman Training Plans*, 1929, p. 5; Arthur G. Henderson, M. S., C. E. *Industrial Engineering and Factory Management*, New York, Ronald Press, 1928, p. 39; Ordway Tead & Henry C. Metcalf, *Personnel Administration, Its Principles and Practices*, New York, McGraw-Hill, 1933, 3rd ed., p. 151; "So You Handle People" by Robert McMurray, Executive Director, the Psychological Corporation, Chicago, in *The Society for Advancement of Management Journal*, November 1937, p. 168; Dale Yoder, *Personnel and Labor Relations*, New York, Prentice-Hall, Inc., 1938, pp. 185-186; Scott, Clothier and Mathewson, *Personnel Management—Principles, Practices, and Points of View*, New York, McGraw-Hill, 1931, pp. 43-44.

inated Association, had no interest other than that of the Company to forward, should now that the anti-U. A. W. A. drive had taken a different form be considered as no longer acting for the Company.

Moreover, if petitioner's contention concerning the activities of the supervisors is that a labor organization, by the simple expedient of enrolling management representatives as members, can legalize otherwise illegal activity, the argument is clearly untenable. In the wholly similar situation in *Virginia Ferry Corporation v. National Labor Relations Board*, 101 F. (2d) 103 (C. C. A. 4), the Court condemned as violative of the Act the coercive activities of a supervisory employee although he was also a member of the Union favored by his activities and the Company sought to excuse them on that ground. Eligibility here for membership in the I. A. M. is, of course, a matter for that organization, not for the Board, to determine. But in deciding whether activity by supervisory employees constitutes illegal employer coercion, the Board like the employees coerced, cannot but regard as the decisive circumstance the actor's status as a management representative. In the present case Fouts and the others spoke with the voice of the authority they had as management representatives, regardless of any other interest they may have had in the I. A. M. They spoke for the Company and their activities constitute illegal assistance to the I. A. M. by the employer."

⁹ See R. L. Greenman, *The Worker, the Foreman, and the Wagner Act*, New York, Harper & Bro., 1938, pp. 114-126.

The Company's part in assisting the I. A. M. independently of the supervisors' activity

Entirely apart from the foregoing, if we were to assume that none of the four men had supervisory authority, the conclusion that the Company was rendering material assistance to the I. A. M. would still be validly grounded upon the fact alone that those who admittedly represented the Company displayed open disfavor of the U. A. W. A., while at the same time they took no steps at all to halt, but instead encouraged, the mass activities going on for the I. A. M. Moreover, the anti-U. A. W. A. activity conducted in the toolroom may not be looked upon as isolated, either in point of time or with reference to the Company's responsibility, from the activity carried on in the rest of the plant in assistance to the I. A. M. Either in the latter part of July or early August, Gregory, who was foreman of the punch press department (R. 513), pointed out to one of the employees under him that "the A. F. of L. is the best" (R. 196-197). And immediately after the closed-shop contract was entered into covering the toolroom employees on August 11 (*infra*, pp. 23-24), the Company made it manifest that it also desired its employees in the other departments to join the I. A. M. Over the signature of its vice president and general manager, Murphy, the Company distributed a mimeographed circular attacking the U. A. W. A. as an organization "whose only method of securing desired results is by the use of lawlessness, violation of property rights or violence" (R. 692, 728), referring to its campaign for members as "the activities of outsiders" (R. 691, 728), and stating not only that

the "strangers * * * have promised to secure for you certain increases in wages * * *, we hope you will not be fooled by these promises" (*Ibid.*), but definitely pointing out that "we will not at this time, or at any time in the future enter into any agreement, written or verbal, with irresponsible organizations, or associations" (R. 692, 728). Personnel Director Lewis openly stated his opposition to "radicals and those that had produced agitation" (R. 31). Men who without question were foremen and assistant foremen, solicited I. A. M. membership among the production employees (R. 85, 87, 107, 191, 200, 202, 205, 207-209, 217, 219). Other employees also solicited for the I. A. M. on company time and to the knowledge of their superiors (R. 88, 123, 125, 128, 136, 193-195, 198, 200-202, 204, 215). Although it had precipitately granted recognition and even a closed shop to the I. A. M. in the toolroom (*infra*, pp. 23-24), the Company, as petitioners admit (R. 690-695, 728), refused recognition to the U. A. W. A. although it clearly represented a majority of the employees. Viewed in the light of these facts, the activity in the toolroom is subject to no reasonable explanation other than that it was actuated and carried on by the Company throughout as part of a consistent plan "to select the I. A. M. as the exclusive representative of the employees in the toolroom as a means of destroying the U. A. W. A., which it opposed," as the Board found (R. 684-685).

The execution of the closed-shop contract

The culmination of the Company's purpose in assisting the I. A. M., and in preventing the success of U. A. W. A. organization, came on August 11, 1937, with its recognition

of the I. A. M. as exclusive representative of the toolmen and the execution of a closed-shop contract (R. 262, 288, 356), although the only proof submitted to the Company by the I. A. M. to justify such recognition was an unsigned, unverified list of members (R. 282, 285). Indeed, the Company's vice president and general manager, Murphy, who at the time of the submission of this list was out of town and had no knowledge whatsoever as to the number of toolmen represented by the I. A. M., telegraphed on August 6 that the Company would accept the I. A. M.'s closed-shop request (R. 282-283). Thus, the Company, precipitately and without even knowledge of the majority status of the I. A. M., and as a climax to its unlawful assistance, gave to the I. A. M. not only recognition, but a closed-shop agreement in order to defeat the competitive efforts of the U. A. W. A.

Petitioners' claims for the validity of the closed-shop contract are wholly untenable

Petitioners contend that, if the I. A. M. was in fact "assisted" by unfair labor practices, such "assistance" was not extended until after July 28, at which time, it is asserted, 34 of the 63 toolroom employees had joined the I. A. M. and that organization was, therefore, the majority representative. The conclusion is drawn that once a union has been selected as a majority representative the Act does not forbid employer assistance in increasing the union's membership (Pet. Br., pp. 9-15). There are three answers: (1) the contention is erroneous in fact, since the I. A. M. was "assisted" by the Company continuously from the time of its first appearance in the plant until the

conclusion of the closed-shop contract on August 11, as well as thereafter; (2) it is not permissible under the Act for an employer to solicit members for, and otherwise assist, a union which is the freely selected representative of the employees in an appropriate unit, and, in any event, the I. A. M. was not such a representative on July 28, or at any time thereafter, for the reason that its selection by the bare majority of the employees was not a free selection recognized by the Act, but had been brought about by the Company's coercion, interference, and assistance; (3) petitioners' contention is, in any event, entirely irrelevant to the validity of the closed-shop contract, since the proviso to Section 8 (3) requires that an organization entering into such a contract shall not have been "assisted" at any time prior to the execution of the contract, the test here being, therefore, whether the I. A. M. was "assisted" prior to August 11, not prior to July 28, as petitioners assume. We shall consider these three propositions in turn.

(1) The evidence discussed *supra*, p. 17, establishes that both prior to and after the first action by the Company's supervisory employees to bring the I. A. M. into the plant, the Company had made it manifest to the employees that it violently opposed the U. A. W. A. and would do everything in its power to keep that organization out of the plant. At the same time not only was no opposition to the I. A. M. expressed, but the Company's representatives actively endeavored to obtain the employees' adherence to that organization. Petitioners' contention that the Company's admitted (R. 729) campaign to defeat the U. A. W. A. ceased upon appearance of the I. A. M., and

was only resumed after that organization held its first meeting on July 28, is in the teeth of the evidence. The record reveals that the Company's campaign was continuous; that it began with the attempt to herd the employees into the Association and, when this proved unsuccessful, took the form of foisting the I. A. M. upon them. Supplementing the evidence which we have already reviewed *supra*, pp. 11-17, is the statement of Personnel Director Lewis that the I. A. M. had been brought into the plant "only for a bluff" (R. 91, 92), and Fouts' and Shock's candid revelation that the Company had intended to use the I. A. M. only in order to defeat the U. A. W. A., and that the closed-shop contract was an instrument of that purpose (R. 35, 36, 98, 100, 170-172, 254, 278-279, 683). The testimony uniformly reveals that Company pressure was exerted on behalf of the I. A. M. from about July 15 until after the conclusion of the closed-shop contract (R. 41), without the hiatus which petitioners now assume without any basis in fact.

(2) The foregoing evidence likewise establishes the inapplicability of petitioners' contention that employer "assistance" rendered to the I. A. M. between July 28 and August 11 was permissible under the Act if the I. A. M. was at that time the authorized representative of the tool-room employees. The Act manifestly deals only with freely chosen representatives. The employees had been forced into the I. A. M. by pressure deliberately exercised by the Company through its supervisors and through its own manifestations of hostility to the U. A. W. A. Under these circumstances petitioners do not, and cannot, estab-

lish that the 34 members they obtained on July 28 had freely chosen the I. A. M. as their representative.

But even if we assume, contrary to the fact, that the small majority obtained by the I. A. M. on July 28 was a freely chosen one, it does not help petitioners. They argue that, once a majority representative has been selected, the employer may exert his influence on behalf of that representative in an effort to increase its majority, and that such activities are not "assistance" within the meaning of the proviso to Section 8 (3). On the contrary, the freedom of choice guaranteed by the Act does not terminate when a representative has been chosen; the minority is still at liberty to retain its membership in another labor organization, and the majority is at all times free to change its representatives. This is particularly important where, as here, the I. A. M. had at most a majority of only two, and there was another labor organization vigorously competing for the allegiance of the men. It was not for the employer to load these almost evenly balanced scales, despite its obvious preference for one of the competitors. It could not, consistently with the Act, seek firmly to establish one organization by coercing the employees into swelling its precarious majority. Petitioners' contention that, no matter how slight the majority, the employer may "promote the union of the majority" (Pet. Br., p. 14) would, in fact, vest the choice of bargaining representatives in the employer, rather than in the employees where Congress has placed it. The statute plainly provides that the only permissible aid which an employer may extend to a majority representative is by the conclu-

sion of a valid closed-shop contract with it, that is, a contract which satisfies the two conditions in the proviso to Section 8 (3) of the Act.

(3) In any event, we fail to see how the majority which the I. A. M. asserts that it had on July 28 is in any way relevant to the validity of the closed-shop contract. The proviso to Section 8 (3) (*supra*, p. 10), requires that the labor organization must not have been "assisted" prior to the time at which the contract is made. Petitioners' contention seeks to establish at most that there was no "assistance" prior to July 28. But the test is clearly whether there was "assistance" prior to August 11, when the contract was executed.

Petitioners seek to avoid the force of some of these activities by contending that the contract was entered into on August 6 and that the "majority" of the "assistance" found by the Board was extended after that day (Pet. Br., pp. 32-35). Both propositions of fact are advanced in plain opposition to the evidence. Petitioners admit that the contract was executed on August 11 (Pet. Br., p. 33), and the evidence permits no other version (R. 262, 288, 356). Although the contract was pre-dated to August 6, the parties expressly provided therein that it "shall become binding upon the signature hereto" (R. 11). Petitioners now calmly dispose of this decisive provision by asserting, without any support, that none of the parties required signature to the contract as a prerequisite to its validity (Pet. Br., p. 33).

Even assuming, contrary to the fact, that the contract was made on August 6, the evidence which we have dis-

cussed establishes that the I. A. M. had received continuous "assistance" by the Company between July 15 and that date. Petitioners' assertion that the "great majority" of the acts of "assistance" occurred after August 6 is not only not sustainable on the record, but ignores the plain fact that the prior acts of "assistance" had operated to bring the I. A. M. into the plant and to coerce enough employees into it to enable it to advance its claims of majority representation. It would, therefore, appear to be immaterial whether the "assistance" extended prior to August 6 constituted a "majority" or a "minority" of the total "assistance."

Finally, petitioners' attempt to establish that they were not "assisted" by unfair labor practices by springing to the defense of the employer, whose aid alone made possible their entry into its plant and their establishment there, by contending that the Company's activities do not constitute interference with the rights of the employees freely to choose representatives within the meaning of the Act (Pet. Br. pp. 36-46). The argument apparently depends entirely upon petitioners' status as national labor organizations, for they concede (R. 728-729) that the Company's efforts, through its supervisors, to combat the U. A. W. A. by forcing the employees into the company-dominated Association, overrode the guaranteed freedom of choice and thereby violated the Act. But when the same methods were employed to further the Company's design to force the employees into the I. A. M. in preference to the U. A. W. A., petitioners claim that the employees' freedom to choose their representatives without interference by the

employer has not been infringed. On the contrary, the right of the employees to be entirely free of "pressure of any kind" was here clearly invaded by the Company, and the record compels the conclusion that its activities had as a purpose and necessary result the subordination of "the employee's will in favor of what the employer desires." *Virginian Railway Co. v. System Federation No. 40*, 84 F. (2d) 641, 643 (C. C. A. 4), aff'd. 200 U. S. 515. In fact, the Company activity which so materially assisted the I. A. M. was conduct differing no whit in kind from that carried on by the Company prior to the appearance of the I. A. M., but which petitioners stipulated afforded ample basis for the Board's finding of interference, restraint, and coercion (R. 673-678, 728-729). Nor did it differ in kind from the activities, particularly those of supervisors, consistently held to violate Section 8 (1) by the Supreme Court and the various Circuit Courts of Appeals. *E. g.*, *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197; *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; *National Labor Relations Board v. Pacific Greyhound Lines, Inc.*, 303 U. S. 272; *National Labor Relations Board v. Cudahy Packing Co.*, 102 F. (2d) 745 (C. C. A. 8); *National Labor Relations Board v. J. Freezer & Son, Inc.*, 95 F. (2d) 840 (C. C. A. 4); *Virginia Ferry Co. v. National Labor Relations Board*, 101 F. (2d) 103 (C. C. A. 4); *National Labor Relations Board v. The A. S. Abell Company*, 97 F. (2d) 951 (C. C. A. 4); *National Labor Relations Board v. The Falk Corporation*, 102 F. (2d) 383 (C. C. A. 7).

The evidence clearly supporting the Board's finding of assistance to the I. A. M., and the defenses set up by petitioners in an effort to justify that assistance having no tenable basis, it follows that the closed-shop contract on this basis alone is invalid in failing to satisfy the first condition of the proviso to Section 8 (3), namely, that such a contract may be made only with a labor organization not assisted by unfair labor practices.

B. The I. A. M. did not represent a majority of the employees in the appropriate collective bargaining unit

The closed-shop contract was properly found by the Board (R. 685) to be invalid for the further and independent reason that the facts do not satisfy the second express condition of the proviso to Section 8 (3), *i. e.*, that such a contract may only be made with a labor organization representing a majority of the employees in the appropriate collective bargaining unit. The closed-shop agreement here was made with Lodge No. 35 of the I. A. M. and covered only the employees in the Company's toolroom (R. 8-11). The Board found, pursuant to its authority under Section 9 (b) of the Act, that the toolroom did not constitute the appropriate unit for collective bargaining in the Company's plant, but that the appropriate unit consisted of all of the production employees at the plant including toolroom employees and excluding only the buffers and polishers and supervisory and office employees engaged in clerical work (R. 689). The bases for this finding are set out in Point II, wherein the reasonableness of the unit found by the Board is demonstrated, to which the Court is referred (*infra*, pp. 37-50).

Failing to meet both of the conditions of the proviso to Section 8 (3), although the failure to satisfy either is fatal to its validity, the closed-shop agreement here is illegal and has no standing under the Act.

C. The Board's order respecting the closed-shop contract was wholly valid and proper

Petitioners do not directly question the authority of the Board to require the Company to cease and desist giving effect to the closed-shop contract with the I. A. M. That provision is a necessary part of the requirement of the other parts of the order that the Company desist from its discrimination in favor of the I. A. M. and against the U. A. W. A., in violation of Section 8 (1) and (3), and that it cease refusing to bargain collectively with the U. A. W. A. in violation of Section 8 (5). The closed-shop contract here being illegal, the Company must squarely violate Section 8 (1) and (3) to require its employees to join a particular labor organization as a condition of employment. But unless the illegal contract is set aside the Company is required by its terms so to discriminate in regard to hire and tenure of employment. Discrimination under these circumstances is forbidden by Section 8 (3) and (1) and may only be prevented by setting aside the contract which required and effected the unlawful discrimination.¹⁰ Moreover, under the contract

¹⁰ The Board's consistent policy is to invalidate closed-shop contracts with labor organizations which are not the freely designated representatives of a majority of employees in an appropriate unit or which have been assisted by unfair labor practices, whether such contracts are with company unions, A. F. of L. unions, or C. I. O. unions. *Matter of National Motor Bearing Co.*, 5 N. L. R. B. 409;

the Company had undertaken to bargain with the I. A. M. as exclusive representative of the toolroom employees, although, as we shall see (*infra*, pp. 50-51), the U. A. W. A. as majority representative of the employees in the appropriate unit was entitled to that right. To permit the closed-shop contract with the I. A. M. to remain in effect, would, therefore, be to sanction a direct and continuing refusal by the Company to bargain with the U. A. W. A. in violation of Section 8 (5) as well as to sanction discrimination under Section 8 (3) and 8 (1).

There is ample authority for an order terminating the effect of a contract which obligates an employer to do acts prohibited by Section 8. Both the *Pennsylvania* and *Pacific Greyhound* cases involved contracts, the termination of which was a necessary consequence of the Board's orders there upheld by the Supreme Court. In each of those cases

Matter of National Electric Products Corporation, 3 N. L. R. B. 476; *Matter of Missouri-Arkansas Coach Lines, Inc.*, 7 N. L. R. B., No. 28; *Matter of Zenite Metal Corporation*, 5 N. L. R. B., No. 509; *Matter of Lenox Shoe Company, Inc.*, 4 N. L. R. B., 372. In *Matter of Mine B Coal Company*, 4 N. L. R. B. 316, upon the petition of the Progressive Miners of America, an A. F. of L. affiliate, the Board, after an election, certified the Progressive Miners as the exclusive bargaining agent despite the fact that a closed-shop contract had previously been obtained from the employer by the United Mine Workers of America, affiliated with the C. I. O. The first National Labor Relations Board, created under Public Resolution 44 (74th Cong., 2d Sess.) also followed the practice of ordering employers to cease giving effect to closed-shop contracts executed under the circumstances of this case. *Matter of Hildinger-Bishop Company*, 1 N. L. R. B. (old), 127. This settled and uniform practice of the Board is entitled to great weight in determining the validity of the provisions of the order here in question. Cf. *Federal Trade Commission v. R. F. Keppel & Bro.*, 291 U. S. 304, 314; *U. S. Navigation Co. v. Cunard S. S. Co.*, 284 U. S. 474, 485.

the employer had entered into a "working agreement" with the labor organization involved, setting up a procedure, in which that organization was to participate, for the settlement of grievances of all employees (1 N. L. R. B. 1, 9-11; 2 N. L. R. B. 431, 452-53), a procedure obviously prohibited by the provisions of the Board's order requiring disestablishment and withdrawal of recognition from the contracting organizations as representatives of the employees for collective bargaining. Orders of the Board expressly directing an employer to cease and desist from giving effect to a contract with a labor organization, where the making of the contract constituted a part of the unfair labor practices have been upheld in *National Labor Relations Board v. Eagle Manufacturing Co.*, 6 N. L. R. B. 492, 507, aff'd. 99 F. (2d) 930 (C. C. A. 4); in *National Labor Relations Board v. Hopwood Retinning Co.*, 98 F. (2d) 97 (C. C. A. 2); in *Cudahy Packing Co. v. National Labor Relations Board*, 102 F. (2d) 745 (C. C. A. 8); and in *National Labor Relations Board v. Stackpole Carbon Co.*, decided May 12, 1939 (C. C. A. 3). See also *System Federation No. 40 v. Virginian Railway Co.*, 11 F. Supp. 621, 622-623, aff'd. 84 F. (2d) 641, aff'd. 300 U. S. 515.

The basis of the provision of the order which operated to terminate the effect of the contracts in the *Greyhound* cases—that the acts prohibited "would serve as a means of thwarting the policy of collective bargaining by enabling the employer * * * to prevent self-organization" (303 U. S., at 271)—is no less applicable where, as in the present case, the contract effects discrimination in violation of Section 8 (1) and (3) and is a bar to the employer's obligation under Section 8 (5). Indeed, the terms of Sec-

tion 8 (3) itself make it clear that an order to desist from acts prohibited thereby will necessarily include a prohibition upon the employer's giving effect to any closed-shop contract not coming within the exception to that subsection, as set forth in the proviso discussed above. On any other assumption, the careful limitation, in that proviso, of the circumstances under which a closed-shop agreement may excuse discrimination (a limitation upon the employer's contracting powers expressly contemplated by Congress) would be meaningless.

The present case offers the very situation which the Supreme Court clearly indicated in *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197,^{10a} would bring the invalidation of contracts within the Board's power to order an employer to cease and desist from unfair labor practices. The closed-shop contract here involved is *per se* illegal in failing to fall within the proviso to Section 8 (3). Such a contract amounted to denial by the Company to its employees of the very right of free choice, the protection of which was the ground of the Court's ruling in the *Consolidated Edison* case, where the contracts involved were not in the face of the Act and merely recognized the contracting union as the representative of its own members. Being so illegal, the Board's order requiring their invalidation rests (as the *Consolidated Edison* order, in the Court's view, could not) upon the mandate of Section 10 (c) that it "shall issue * * *

^{10a} The important procedural error found by the Court in the *Consolidated Edison* case—failure properly to place the validity of the contracts in issue with notice to the interested labor organization—is not present here. It is stipulated that there are no such procedural questions in this case (*supra*, p. 8).

an order requiring [the employer] to cease and desist from such unfair labor practice" as it has found to have been committed.

Apart from this power, however, and viewing the invalidation of the contracts here as a mere exercise of the Board's authority to order affirmative action to effectuate the policies of the Act, the invalidation order is entirely proper under the principles enunciated in the *Consolidated Edison* case. The very conditions which the Court there indicated would render invalidation an appropriate form of affirmative order are present here. The contract in this case was not only "a consequence of the unfair labor practices found" but to uphold it would completely "thwart the purposes of the Act" expressly stated in Section 8 (1) and (3), and its "cancellation would * * * make the order to cease the specified practices * * * more effective"—in fact cancellation is absolutely necessary to the effectiveness of the order (305 U. S. at 236).

The invalidation of the closed-shop contract, whether viewed as a mere particularization of the general cease-and-desist provisions of the Board's order, or as a form of affirmative remedial action, was thus clearly within the Board's powers under Section 10 (c) of the Act, under the principles laid down in the *Greyhound* cases and affirmed in the *Consolidated Edison* case.

The contention in petitioners' brief (p. 46) that the Board, in any event, should not have invalidated the whole contract but should only have stricken the closed-shop provision, has several answers. In the first place, the contract in its entirety was made with an organization that not only was not the majority representative of the employees in the appropriate unit (*infra*, pp. 37-50), but as

we have seen, the I. A. M. was not even the freely chosen representative of the toolroom employees. The I. A. M. had no authority, therefore, to negotiate a contract in any part as exclusive representatives of employees that it did not freely represent. Secondly, the record demonstrates that the chief purpose and motivating reason of the contract was the exclusive recognition and closed-shop clause.¹¹ The Board could not, therefore, no more than may courts, by striking out particular provisions, have written a new contract for the parties which they probably would not have written themselves. Finally, the contract in its entirety was the purpose and successful result of the Company's drive to defeat the U. A. W. A. through the establishment of the I. A. M. To restore the *status quo* exactly and to dissipate entirely the effects of the unlawful activity, it was necessary to eliminate *in toto* the illegal bond which associated the I. A. M. with the Company.

POINT II

THE BOARD'S FINDING REGARDING THE UNIT APPROPRIATE FOR COLLECTIVE BARGAINING WAS REASONABLE

Section 9 (b) of the Act provides that the Board "shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of the Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit,

¹¹ The evidence is uncontradicted that in the negotiation of the contract no complaint was made as to hours of work, rates of pay, or working conditions (R. 258, 260, 272-273, 279-280, 295). Actually the contract increased the working week in the toolroom from 40 to 44 hours (R. 273, 285-287, 387, 508).

plant unit, or subdivision thereof." The Board concluded that in this case a unit composed of all of the production employees at the plant, including toolroom employees but excluding buffers and polishers, supervisory, and office employees performing work of a clerical nature,¹² was appropriate for collective bargaining (R. 689). The relevant facts, we submit, give ample support to the Board's conclusion. Before dealing with those facts, however, it will be helpful to emphasize certain important preliminary considerations touching the power reposed in the Board by Section 9 (b).

As is clear from the text of the Act and its legislative history, Congress, in investing the Board with the function of determining the unit appropriate for collective bargaining purposes, did not restrict and had no intention of restricting the Board to the use of inflexible rules. Whether, with respect to any given group of employees, one unit or another is appropriate is a matter which Congress expressly realized was "obviously one for determination in each individual case" (H. Rep. 1147, 74th Cong., 1st Sess., p. 22). Congress also expressly recognized that the problem facing the Board would "ordinarily arise as between two or more bona fide organizations competing to represent the employees" (*Ibid.*). The power committed to the Board is, therefore, "a broad power of dis-

¹² All of the parties agreed that the buffers and polishers, which are not eligible to membership in either the I. A. M. or the U. A. W. A., should not be included in the unit found to be appropriate (R. 173-174, 430-431). Nor was objection made to the exclusion of supervisors and office employees in accordance with the Board's normal practice. (*Third Annual Report of the National Labor Relations Board* (1938), pp. 180-185.)

cretion" (*National Labor Relations Board v. Lund*, decided May 10, 1939 (C. C. A. 8)) the exercise of which is final unless clearly "arbitrary" (*National Labor Relations Board v. Carlisle Lumber Co.*, 94 F. (2d) 138, 143 (C. C. A. 9), cert. den. 304 U. S. 575). See also, *Brotherhood of Ry. Trainmen v. National Mediation Board*, 88 F. (2d) 757, 761 (App. D. C.); *Association of C. E. of A., T. & S. F. Ry. System v. Brotherhood of Ry. and S. S. Clerks*, 85 F. (2d) 152, 157 (C. C. A. 7th); *Nashville, C. & St. L. Ry. v. Ry. Employees' Dept.*, 93 F. (2d) 340, 342 (C. C. A. 6th), cert. den., 303 U. S. 649. As in every case involving discretionary powers entrusted to an administrative body having a specialized familiarity and experience in a particular field, its exercise will not be disturbed by the courts unless manifestly arbitrary. *Ibid*; see also, *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 270; *U. S. Navigation Co. v. Cunard S. S. Co.*, 284 U. S. 474, 485; *Federal Trade Commission v. R. F. Keppel & Bro.*, 291 U. S. 304, 314.

Furthermore, it is important to bear in mind that the question here is not whether the toolroom is a more appropriate unit than the larger unit found by the Board, or *vice versa*. In many cases, a craft unit and a plant unit would each be appropriate, and the choice of either would in no sense be unreasonable or arbitrary. Hence, the sole question before the Court is whether, under the facts about to be outlined, petitioners can establish clearly that there is no reasonable basis for the Board's conclusion that the unit it selected was appropriate for collective bargaining (Section 9 (b)). That that obligation upon petitioners cannot be met is clear from the relevant facts.

In determining what unit should be selected upon the facts presented in this case, the Board was faced with a particularly difficult problem. On the one hand, the U. A. W. A. was contending that the appropriate unit consisted of all of the employees at the plant exclusive only of the buffers and polishers, supervisory, and office employee engaged in clerical work. In support of this contention the record showed, first, that there was a strong functional interdependence between the work done in the toolroom and that done in the production departments of the plant. The toolmen, as the Board found (R. 689), make and repair the tools and dies necessary for the operation of the other departments, and the toolmen are responsible for maintaining the machinery in working order (R. 160, 229, 376). Indeed, it was not disputed that "primarily the toolroom is the beginning of production. Without the toolroom, without tools and dies there cannot be any production" (R. 230). Moreover, the toolroom work is done solely for the benefit of the production departments; none of the tools and dies made are sold on the market to any other concern (R. 229-230). The close relation between the toolroom and the other departments is further demonstrated by the fact that the toolmen are at liberty to go from the toolroom to other departments, and, indeed, it is often necessary for them to do so in connection with their work of keeping the machinery in repair (R. 48). This factor of functional interdependence between departments is an important consideration; it demonstrates that there are many common questions which are the subject of collective bargaining and which make for the propriety of a

single bargaining unit. Accordingly, it is the settled policy of the Board to give the existence of this factor substantial weight in making unit determinations. *Third Annual Report of the National Labor Relations Board* (1938) pp. 191-192.¹³

Likewise supporting the U. A. W. A. claim as to the appropriate bargaining unit are the uncontroverted considerations that both the production and toolroom employees are eligible for membership in the I. A. M. as well as in the U. A. W. A.; that both unions had attempted to enroll the

¹³ In *Matter of Acklin Stamping Co.*, 2 N. L. R. B. 872, 877, the Board, upon facts entirely analogous to those presented in the case at bar, in including toolroom employees with other production workers in a single bargaining unit, emphasized the fact of functional interdependence as follows:

"The Company has divided its plant, consisting of one floor, into numerous small departments for cost purposes and into large departments for purposes of control. The tool and die and die repair department and the machine repair and maintenance department are two of these larger departments. They are separated from one another as are the other departments only by means of a fence. However, not all of the work performed by the employees in the plant including these employees in the two aforementioned departments is performed within the physical confines of their respective departments. The performance of their duties constantly takes them to nearly every other department in the plant. Thus they work and come in contact with employees in the other departments all the time. Although there is some measure of physical separation between the various departments in the plant, including the tool and die and die repair as well as the machine repair and maintenance departments, all function coherently in the completion of a specific order for goods. Each department in turn contributes its share of work to the filling of every order for goods. Furthermore, every individual department cooperates fully with every other one in the completion of the finished product; none of the individual departments is able to complete any specific order for goods without the help of the others."

production and toolroom employees (R. 430-431; 672, 728);¹⁴ and that, despite the Company's determined efforts to prevent it, a substantial number of the toolmen had joined the U. A. W. A.,¹⁵ thereby expressing their preference that the unit for collective bargaining be the plant rather than a craft unit. Eligibility for membership and the actual desires of employees as demonstrated by their free self-organization are both factors to which the Board normally and properly gives considerable weight in determining the propriety of the bargaining unit. *Third Annual Report of the National Labor Relations Board (1938)*, pp. 163-167.

On the other hand, in support of the I. A. M. claim that the toolroom employees should be held to be a separate bargaining unit was the consideration that they are more skilled and generally, although not always, receive higher rates of pay than the other production workers in the plant.¹⁶

In such a situation, where the considerations are such that the Board could reasonably conclude that either the

¹⁴ We discuss the significance of this fact further *infra*, pp. 42-48.

¹⁵ It was stipulated that by August 10, 1937, 20 toolroom employees had signed U. A. W. A. membership application cards and 37 had signed I. A. M. membership application cards, out of a total of 63 men employed in the toolroom (R. 491). Included in the number that had signed for each union were two men who had signed cards for membership in both organizations. At the time of the hearing, the record shows that 22 toolroom employees had signed cards for the U. A. W. A. who had never in any manner designated the I. A. M. as their representative (R. 486-490).

¹⁶ As to this, however, the record shows that some of the men in other departments earn even higher wages than the toolmen (R. 241-242).

craft or the plant unit would be appropriate for collective bargaining purposes and where either contention if unopposed would be adopted by the Board, the Board has normally given paramount weight to the wishes of the employees within the craft unit. This policy, familiarly known as the *Globe* doctrine, taking its name from the case in which it was first announced,¹⁷ has met with general approval as being eminently fair,¹⁸ and, indeed, petitioners herein do not take exception to it. It leaves the decision as to whether the craft employees shall bargain through a craft union or through a plant union entirely up to the craft employees themselves. If a majority of them demonstrate their desire, by an election or otherwise, to bargain through the craft union, that is permitted them. If a majority do not so wish, but on the contrary wish to be represented on a plant-wide basis, no reason appears why they should be set apart in a separate bargaining unit and the larger unit requested by other employees is adopted.

However, for special reasons about to be stated, the Board concluded that it should not utilize the *Globe* doctrine in this case in aid of its function of determining the appropriate unit. Petitioners endeavor to make much of this (Br. pp. 47-56). But petitioners' argument on this score is irrelevant to the issue before the Court. That issue is solely whether the ultimate determination of the Board

¹⁷ *Matter of Globe Machine & Stamping Co.*, 3 N. L. R. B. 294. For a collection of the cases in which the Board has applied this policy, see *Third Annual Report of the National Labor Relations Board* (1938), pp. 167-174.

¹⁸ 32 Illinois Law Review 599; Cornell Law Quarterly 392; 47 Yale Law Journal 122; 38 Columbia Law Review 1243; 7 International Juridical Association Bulletin 69.

regarding the plant unit is arbitrary. *Lund* and *Carlisle Lumber* cases, *supra*, p. 39. That issue does not encompass the question whether the Board should or should not have utilized one or another administrative technique in arriving at its ultimate determination, nor will a reviewing Court undertake to express approval or disapproval of the *Globe* doctrine or any other such administrative method not required by the Act but only evolved by the Board in the exercise of and in aid of its administrative functions. Indeed, were the facts such that the *Globe* doctrine would normally have been applied by the Board, the failure to apply it would not be a ground for disturbing a reasonable finding that a particular unit was appropriate for collective bargaining. In order, however, that the Court may fully understand this feature of the case, the reasons why the Board concluded that the *Globe* doctrine, if applied in this case, would have been to depart from the plain policies of the Act, will briefly be stated.

The *Globe* doctrine patently envisions a situation not only where a substantial number of the employees within a recognizable craft dispute the propriety of a larger unit petitioned for by other employees, and express their desire to treat with the employer upon a separate basis,¹⁹ but further demands that the circumstances be such that the employees within the craft may freely express their preference. Here, however, the record is barren of any showing

¹⁹ *Matter of Allis-Chalmers Manufacturing Co.*, 4 N. L. R. B. 159; *Matter of American Hardware Corporation*, 4 N. L. R. B. 412; *Matter of Bemis Bag Co.*, 5 N. L. R. B. 70; *Matter of Waggoner Refining Co.*, 6 N. L. R. B. 731; *Matter of Pure Oil Co.*, 8 N. L. R. B. 207; *Matter of Indianapolis Times*, 8 N. L. R. B. 1256.

that there was or would have been any effort on the part of the toolmen of their own volition to establish themselves as a separate group for collective bargaining purposes, apart from the Company's introduction of the I. A. M. into the plant and the Company's continued interference and coercion thereafter to establish the toolroom employees as a craft unit to be represented by the I. A. M., the Company's choice for the men. In any event, petitioners, in the face of the unlawful assistance they received, cannot establish that there was or could have been any such free action upon the part of the toolroom employees.

Moreover, the whole course of the Company's activity in influencing and coercing the toolmen as to their wishes respecting representatives for collective bargaining made it plain that to consult the men would serve no purpose in bringing to light their true desires. Indeed, it would have been to challenge the policies of the Act to accept the result of a ballot among employees so influenced and coerced in favor of the craft unit by their employer.

Absent, therefore, any evidence that the toolmen themselves freely wished bargaining rights apart from the other employees in the plant, and it being impossible by reason of the past interference and coercion of the Company, to ascertain by election or otherwise whether they wished freely to continue their affiliation in Lodge No. 35 of the I. A. M., the Board acted entirely reasonably in refusing to set the toolmen apart as a separate bargaining unit.

The reasonableness of the Board's action is wholly untouched by petitioners' contention (Pet. Br. p. 50) that the Board should have "preserved" the toolroom em-

ployees as a separate unit until such a time as the employer's unfair labor practices had been dissipated and the men would be free to express a real choice. The answer is twofold. First, the Board was concerned, as petitioners admit it should be concerned (Pet. Br. p. 55), with seeing to it the bargaining unit "shall not be hand-picked by employers." There was no question here presented of "preserving" the toolroom men as a separate unit. As already pointed out, insofar as the men had appeared to favor a separate unit, that action was the result of the Company's choice, not theirs. Second, petitioner's argument assumes that the Board's decision precludes for all time inquiry into whether the toolroom men wish to be represented in collective bargaining as a craft apart from the Company's other employees. That assumption is without any basis. The Board's conclusion that, under the circumstances existing at the time of its decision, the toolroom employees should not be deemed a separate bargaining unit, did not set up a fixed and unyielding category. The toolroom employees, if they so desire, are free to petition the Board for the holding of an election in which they may express their preference to be represented upon a craft rather than a plant-wide basis. This plain course, expressly left open by the Board's order (R. 699), neither Lodge No. 35 of the I. A. M. as purported representative of the toolmen, nor the toolmen themselves, have seen fit to follow, although by complying with the Board's order the Company has fully cooperated in dissipating the effects of its unfair labor practices and in facilitating now a free choice by the employees.

The very fact that this opportunity for the expression of the wishes of the toolmen is open to them, forecloses the sweeping and utterly unfounded claim by petitioners that the Board has destroyed an established craft union and has exercised a punitive jurisdiction. The Board has no such interest in any of the cases coming before it. Wherever a craft union, showing any substantial membership in a group of craft employees has claimed a craft unit to be appropriate, and no other union has made a contrary claim, the Board has held that the craft was appropriate. *E. g.*, *Matter of Duplex Printing Co.*, 1 N. L. R. B. 82; *Matter of Campbell Machine Co.*, 3 N. L. R. B. 793; *Matter of Worthington Co.*, 4 N. L. R. B. 448; *Matter of National Sewing Machine Co.*, 5 N. L. R. B. 372. Wherever a craft union showing a substantial membership has claimed the craft as the appropriate unit, and a rival union has claimed a larger unit including the craft group to be appropriate, the Board has applied the *Globe* doctrine. *E. g.*, *Matter of City Auto Stamping Co.*, 3 N. L. R. B. 306; *Matter of Pennsylvania Greyhound Lines, Inc.*, 3 N. L. R. B. 622; *Matter of Allis-Chalmers Mfg. Co.*, 4 N. L. R. B. 159; *Matter of Shell Oil Company*, 7 N. L. R. B. 417. And, in the present case, where the *Globe* doctrine could not be applied under the special circumstances at the time existing, its fair application is not necessarily precluded under changed circumstances. The Board's action in this case, therefore, is far from being arbitrary; it cannot be considered as other than reasonable.

In addition to the reasons thus far advanced respecting the propriety of the Board's inclusion of the toolroom em-

ployees in the unit found to be appropriate, a majority of the Board concluded that the fact that the I. A. M. was itself organizing both the toolroom and the production workers at approximately the same time made it appear that their division into two locals was artificial so far as the appropriate unit for collective bargaining was concerned, and that, therefore, the I. A. M. could not be heard to maintain that a separate craft unit was appropriate (R. 689).²⁰ The record affords ample basis for this conclusion.

While the I. A. M. campaign for members was first concentrated upon the toolroom employees, it extended its drive to the other production employees as early as August 10 (R. 430-431), even before it had concluded the execution of the closed-shop contract in the toolroom. That it did not itself consider the two locals—Lodge No. 35 and Production Lodge No. 1200—as separate entities insofar as the function of collective bargaining was concerned, is shown by the fact that the membership application cards presented for the signature of the employees, whether toolroom or production workers, authorized the I. A. M., not the separate locals, to act as the bargaining representative (R. 637). Accordingly, the mere fact of membership by the toolmen in the I. A. M. was of no sub-

²⁰ The Chairman of the Board, while agreeing that "both the U. A. W. and the I. A. M. admit to membership and in this instance endeavored to organize all of the production employees at the respondent's Muncie plant, except buffers and polishers" (R. 689), in a separate concurring opinion, found it unnecessary for the decision of this case "to conclude that the division into two locals was artificial and that the I. A. M. could not be heard to maintain that the craft unit was appropriate" (R. 701).

stantial significance in determining whether they wished collective bargaining upon a craft or upon a plant-wide basis.

Similarly, in the actual negotiations carried on with the Company, McDonald, as Grand Lodge representative of the I. A. M. and not of the locals, was the moving figure (R. 243-249, 184, 186, 243-249, 271-277). Not only did he act for Local No. 35 in securing the closed-shop contract (R. 243-249, 271-277), affixing his name thereto on behalf of the I. A. M. (R. 11), but he also conducted the negotiations had with the Company in behalf of the men in Lodge No. 1200 (R. 183-184, 318-320; Tr. 1528-1532). That it was the I. A. M. and not the locals that in practice bargained for the men is further evidenced by the fact that the I. A. M., and not the locals, petitioned to intervene in the proceeding before the Board claiming that *it* represented the production employees (R. 466-667). Again, in the affidavit made part of the petition to review herein, it is alleged that the men who became members of Lodge No. 1200 "*through such membership, expressed their desires to be represented for collective bargaining purposes by the International Association of Machinists*" (R. 12). That the I. A. M. did not consider real any distinction between the two locals for collective bargaining purposes, is further apparent from the fact that McDonald, who represented the I. A. M. at the hearing, there stated that should the Board find as appropriate a unit including both the toolroom and other production workers, the I. A. M. would act as representative for all of the men (R. 441-442).

From these facts it clearly appears that the I. A. M. did not consider as inappropriate, and certainly not arbitrary, a unit permitting collective bargaining for all of the men through a single representative. Clearly, it was not in a position to urge to the contrary before the Board. The majority of the Board were entitled to consider these facts in determining the propriety of the unit. Their consideration does not, however, as petitioners apparently take it, indicate any abandonment of the *Globe* doctrine. That doctrine has been applied in eight cases decided by the Board subsequent to the present case.²¹ The special facts of this case indicate nothing other than that the Board was well justified in concluding that a unit including the toolroom employees with the bulk of the other production workers was proper. The Board's action being entirely reasonable, it should not, therefore, be disturbed by the Court.

POINT III

THE BOARD PROPERLY REQUIRED THE COMPANY TO CEASE REFUSING TO BARGAIN WITH THE U. A. W. A. AS REPRESENTATIVE OF A MAJORITY OF THE EMPLOYEES IN THE UNIT FOUND TO BE APPROPRIATE

The Board found that on and after August 10, 1937, the Company refused to bargain collectively with the U. A. W. A., although that union then represented a majority of the employees in the appropriate unit (R. 688-695). Petitioners, while admitting the findings as to the refusal to

²¹ *E. g.*, *Matter of Vultee Aircraft Division*, 9 N. L. R. B., No. 9; *Matter of Union Premier Food Stores, Inc.*, 10 N. L. R. B., No. 26.

bargain (R. 690-695, 728), claim that the U. A. W. A. did not represent a majority of the employees at the time of the hearing, and that, even if that were not the fact, a change in representation occurred between the time of the hearing held in this case and the issuance of the Board's decision. For these reasons, petitioners contend that the Board should not have required the Company to cease refusing to bargain with the U. A. W. A. (Pet. Br. pp. 57-70). Petitioners' contentions are wholly lacking in merit.

The claim that the U. A. W. A. did not represent a majority at the time of the hearing is wholly unsupported by the record. The facts are that on August 10 the U. A. W. A. represented a majority of the Company's employees. By stipulation all parties agreed that by that date the U. A. W. A. had signed membership application cards for a total of 384 employees out of 581 then on the Company's pay roll (R. 490-491).²² Even deducting from the number who had signed U. A. W. A. cards, the names of 2 men who had also signed I. A. M. cards (R. 491), 1 who no longer considered himself a U. A. W. A. member (R. 435), and 4 more who had withdrawn (R. 433), the U. A. W. A. still had a membership of 377—a clear majority at the time that the Company refused to bargain with it. It was upon this evidence, plus the proof of the refusal to bargain, that

²² In the John-Lees division of the plant 223 men had signed U. A. W. A. cards as against 15 who signed for the I. A. M.; the total number of men working in that division was 330 (R. 490). In the Acme division of the plant 141 men had signed U. A. W. A. cards as against 1 who had signed for the I. A. M.; the total number of men working on that division was 188 (R. 491). In the toolroom, out of a total of 63 persons employed, 20 had signed U. A. W. A. cards as against 37 who had signed for the I. A. M. (*Ibid.*).

the Board's findings and order to bargain were made (R. 689-690).

The only figures in the record as to representation after August 10 show that as of October 15, exclusive of the tool-room and the buffing and polishing departments, the U. A. W. A. had 471 signed application cards and that the I. A. M. had 298 signed application cards (R. 491). Discounting the cards of 91 persons who had signed applications in both unions, the U. A. W. A. nevertheless represented a majority of the 673 production employees then on the Company's pay roll (*Ibid.*). While petitioners claim that these cards are not indicative of the true state of representation at the time of the hearing, it is significant that at the hearing petitioners made no effort to introduce any evidence in support of the bare assertion they now forward. The Board would have committed gross error to have assumed, without evidence, that a change had occurred between the time of the refusal to bargain and the date of the hearing, even if such a fact could be deemed material to the Board's power to remedy a prior unfair labor practice (Section 10 (c)).

At some length, however, petitioners argue that since they made representations to the Board following the hearing that the U. A. W. A. had lost its majority status, and had requested that an election be held, the Board should not have required the Company to bargain with the U. A. W. A. but should have withheld action pending the results of an election. This the Board could not properly have done.

The power of the Board to make orders restraining unfair labor practices and directing affirmative relief suitable to remedying them (Section 10 (c)) is a power geared directly to the unfair labor practices and the date and circumstances of their commission. It is the power to restore the "status quo" disturbed by the unfair labor practices. As the Supreme Court held in the *Pennsylvania Greyhound* case and reaffirmed in *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 348, "the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress." To the proper exercise of that authority as Congress intended, subsequent changes in circumstances occurring while the unfair labor practices are still unremedied by the Board are normally immaterial. The reason for this is that it cannot be determined to what extent the alleged change was due to the unfair labor practices and to what extent caused by independent reasons. Particularly is this true of an alleged change in majority representation subsequent to a refusal to bargain, since the very denial of collective bargaining rights, the objective in selecting a bargaining representative, induces or can induce the employee to lose faith in his selection. Hence it must be assumed that, but for the unfair labor practices in this case, the asserted change would not have occurred. Expressed another way, the Act not only would not be workable but would be an illusion if employers were permitted to enjoy, as a fruit of their violations of Section 8 (5), an immunity from its enforcement. Hence, petitioners' assertion that the al-

leged change was the result of the free choice of the employees (Br. pp. 60-63), is legally defective as well as nowhere supported by the record. By the same token, until the effects of the Company's unfair labor practices were dissipated and it was fully clear to the men that they were free to express a real choice, the Board could not, by election or otherwise, determine whether in fact a change in representation had taken place.²³

The courts have recognized the validity of the principles just outlined. As recently as March 13, 1939, the Sixth Circuit, in a case directly in point, *National Labor Relations Board v. Louisville Refining Co.*, 102 F. (2d) 678, held as follows:

During the proceedings a paper purporting to be signed by fifty-three employees of respondent, executed July 16, 1937, some five months after the discharges, was filed with the Board asking for a discontinuance of the proceedings. The men who signed the paper did not appear nor testify as to the facts set forth in the so-called intervening petition.

²³ This is wholly unaffected by the fact that in the settlement of an injunction suit brought by the Company against the continuance of a strike instituted by the U. A. W. A., the two parties apparently agreed that an election should be conducted by the Board to determine representation (R. 473). Aside from the fact that the Company and the U. A. W. A. could not by private contract bind the Board to conduct an election where the circumstances clearly indicated that the results of such an election would not be trustworthy because of the unfair labor practices, it would appear that the parties' real intention was not that the dispute should be settled solely by an election, but that the dispute should be placed before the Board for "an election or hearing" (R. 185). What the parties wanted essentially was to open a strike-bound plant and to leave the dispute for settlement by the Board under the Act.

No evidence appears as to the circumstances under which the paper was secured. The facts which it sets forth, if true, are subsequent to and in no way affect the acts complained of nor the legal conclusion therefrom. “* * * an order of the character made by the Board, lawful when made, does not become moot * * * because changing circumstances indicate that the need for it may be less than when made.” *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271.

Similarly, in *National Labor Relations Board v. Remington Rand Inc.*, 94 F. (2d) 862 (C. C. A. 2), cert. den. 304 U. S. 576, a case misconceived by petitioners (Br. pp. 65-66), it was contended that the union involved had lost its majority status subsequent to the refusal to bargain. The Court admitted that it was “impossible to judge” what the employees’ real choice was, but held that the union must be given “some presumptive authority, otherwise the Act will not be workable” (94 F. (2d), at 869-870). It therefore enforced the Board’s order with the proviso that if bona fide doubt of majority representation should thereafter arise, recourse should be had to the procedure provided in the Act for determining the authorized representatives of employees (Section 9 (c)). And in *National Labor Relations Board v. Biles-Coleman Lumber Co.*, 96 F. (2d) 197 (C. C. A. 9), the Court held that it, like the Board, could properly consider only the facts developed at the hearing and that an order to bargain collectively, based upon such facts, could not be attacked by a motion filed with the Court to adduce additional evidence upon an asserted subsequent change of representation.

A similar question has likewise been adjudicated in a leading decision under the analagous Railway Labor Act. *Brotherhood of Railway Clerks v. Teras & New Orleans R. Co.*, 24 F. (2d) 426 (S. D. Texas), 25 F. (2d) 873, 876 (ibid.), aff'd 33 F. (2d) 13 (C. C. A. 5), aff'd 281 U. S. 548. The Brotherhood brought suit in the District Court under Section 2 (3) of the Railway Labor Act of 1926, which provides that bargaining representatives be chosen without "interference, influence, or coercion" (24 F. (2d) at 427). The Brotherhood claimed that, although it was the duly authorized representatives of the clerks, the railroad was fostering a labor organization known as the Association of Clerical Employees and was coercing members of the Brotherhood to designate the Association as their representative. A temporary injunction issued following closely the language of Section 2 (3) of the Railway Labor Act. Thereafter, contempt proceedings were brought in which the Brotherhood asserted that the Company had, despite the injunction, recognized the Association as the employees' representative. The company's defense was that the Association had, prior to the filing of the injunction suit, obtained authorizations from a majority of the employees in the appropriate unit and thereby had gained, and the Brotherhood had lost, the status of bargaining representative. The District Court rejected this defense, regarding the number of authorizations obtained by the Association as irrelevant since they had been obtained by means which violated the statute (24 F. (2d), at 432, 434). The court held the company in contempt and provided in its remedial order that the Brotherhood be reestablished as the authorized representative of the em-

employees "until by proper ballot the employees, without dictation or interference, vote otherwise * * *" (24 F. (2d), at 434). Thereafter the Company's motion to vacate the order was denied, the court stating that its order was designed "to restore the status quo ante" (25 F. (2d), at 877). The court referred to the desirability of "restoring the Brotherhood to their undoubted status quo as representative of the employees * * * (Ibid.), noted that "the status restored was disturbed by the railroad company, in violation of the law and of the injunction" (p. 878), and reaffirmed its view that the injunction and contempt order did no more than to realize the right of the employees to select their representatives free of employer domination (Ibid.).

On appeal, the Fifth Circuit held that the provisions of the contempt order did not exceed the District Court's power under the statute "to provide for the restoration of the status quo" (33 F. (2d) 13, at 17). On writ of certiorari, the Supreme Court held that the decree did not go beyond "the proper enforcement of the provision of the Railway Labor Act" (281 U. S. 548, at 571), and pointed out that the right of collective bargaining "would be a mockery if representation were made futile by interference with freedom of choice" (p. 570).

This principle—that despite apparent loss of a union's majority after anti-union practices of the employer, the union is entitled to exclusive representative status "until such time as the employees, without the interference, restraint, or coercion of the company or its agents, choose some other representative"—was adopted by the first Na-

tional Labor Relations Board,²⁴ with express reference to the remedial action sanctioned by the Supreme Court in the *Texas and New Orleans* case. *Matter of North Carolina Granite Corporation*, 1 (old) N. L. R. B. 89; *Matter of Danbury & Bethel Fur Company*, 1 (old) N. L. R. B. 195; cf. *Matter of Lyon Oil Refining Company*, Decisions of the Petroleum Labor Policy Board, p. 34.

As the Supreme Court has expressly recognized (*National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 266-267), and as is clear from the legislative history of the Act, Congress, in enacting the National Labor Relations Act, had before it, and relied upon, the *Texas & New Orleans* case and the uniform administrative practice of quasi-judicial tribunals created to deal with labor problems.²⁵ It is clear that Congress accepted the order approved by the Supreme Court in the *Texas and New Orleans* case and the available administrative rulings as decisive and worthy precedents concerning the scope of the right of collective bargaining which it intended to guarantee in the Act. The present Board has consistently adhered to this manifest intent of Congress.²⁶

²⁴ Created under Public Resolution No. 44, 73d Congress, 2d Session, to protect the freedom in selection of bargaining representatives guaranteed in Section 7 (a) of the National Industrial Recovery Act.

²⁵ See Report of House Committee on Labor (H. Rept. No. 1147, 74th Cong., 1st Sess., pp. 3-7, 15-18, 22, 24); Report of Senate Committee on Education and Labor (Sen. Rept. No. 573, 74th Cong., 1st Sess., pp. 2, 9, 13, 16, 17).

²⁶ *Matter of Kiddie Kover Manufacturing Co.*, 6 N. L. R. B. 355; *Matter of Bradford Dyeing Association (U. S. A.)*, 4 N. L. R. B. 604; *Matter of Somerset Shoe Co.*, 5 N. L. R. B. 486; *Matter of Sunshine Mining Co.*, 7 N. L. R. B. 1252.

Nor does *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 59 S. Ct. 490, cited by petitioners (pp. 66-67), support their position. There it clearly appeared of record that the union, because of the valid discharge of certain men by the employer after the refusal to bargain, had lost its majority status. That situation does not exist in the present case where the record shows no change of affiliation and where if a change in fact has occurred it cannot be viewed as other than the result of the Company's unfair labor practices.

Finally, it is an important consideration that, in directing the Company to refrain from refusing to bargain with the U. A. W. A., the order does not, of course, give to the U. A. W. A. a permanent status as majority representative of the employees. Petitioners' argument, in assuming that to be so, wholly misconceives the effect of the order. If, indeed, it is true that the U. A. W. A. no longer in fact and of free choice represents the employees in the appropriate unit, petitioners may—now that the effects of the unfair labor practices have been dissipated by the Company's compliance with the order—properly petition the Board to investigate the question of representation. Its request for an election before the Board had even entered its order and when the effects of the unfair labor practices were still manifest does not, under the conditions now present, preclude such an investigation. This proper course petitioners have made no attempt to follow.

For the foregoing reasons, the Board, upon the undisputed proof that the U. A. W. A. was the representative of a majority of the employees at the time of the refusal

to bargain, and that any change in representation cannot be viewed apart from the Company's unlawful practices, properly and under the uniform decisions of the Courts in similar cases, required the Company to bargain with the U. A. W. A. The Board could not deprive the U. A. W. A. of a present right guaranteed by the Act upon the irrelevant possibility that sometime in the future a majority of the employees, in a choice not influenced by employer coercion and interference, and after the violations of the law have been remedied, might select a different representative or elect not to be represented at all for purposes of collective bargaining.

CONCLUSION

It is respectfully submitted that the Board's findings herein challenged are fully supported by the evidence, that its order in the respects challenged is entirely valid and proper, and that the petition herein filed, insofar as it prays that the Board's order be set aside and for other relief, be denied and dismissed.

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MAY 1939.

Judge Miller

U.S. DISTRICT COURT
COURT OF APPEALS
DISTRICT OF COLUMBIA

FILED JUN 13 1938

No. 7258-Special Calendar

**In the United States Court of Appeals for the
District of Columbia**

APRIL TERM, 1938

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MAKERS LODGE NO. 35, AFFILIATED WITH THE INTERNATIONAL
ASSOCIATION OF MACHINISTS, AND PRODUCTION LODGE NO. 1200,
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v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR
RELATIONS BOARD

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NATIONAL LABOR RELATIONS BOARD*

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The Board files this supplemental memorandum by leave of Court. Its purpose is to clarify the effect, upon certain issues, of the illegal conduct by which the employer supplied the initial impetus for the movement to form a Machinists' organization in the toolroom and thereafter aided in establishing that organization; to demonstrate that that illegal assistance not only warranted but required—if the express terms and policies of the Act are not to be ignored—the Board's finding that the closed-shop contract is invalid, its finding that the toolroom was not an appropriate bargaining unit, and its finding that the plant unit was.

It cannot be controverted that the company aided, encouraged, and assisted the organization of the Machinists in the toolroom by conduct which violated the Act. The company informed its employees, by coercive statements, promotion of a company

union, and discriminatory discharges (all stipulated to exist in this case), that the employees could not select the Automobile Workers as their bargaining representative. While thus effectively discouraging, deterring, and penalizing activity in behalf of the Automobile Workers Union, the company at the same time advanced the cause of a substitute representative acceptable to it, by freely turning its premises over to be used, without protest, as a recruiting headquarters for the Machinists, by permitting its supervisory employees (frequently by threatening and coercive statements and conduct) to participate in and assist that recruiting, by announcing that it would crown these efforts with the recognition it would not give to the first organization, and by fulfilling that coercive promise when the desired result occurred: the attainment of a majority by the favored organization.

The Board has held in a multitude of cases that such conduct destroys freedom of choice, as plainly it does, and is a violation of Section 8 (1) of the Act. Every court to which such a case has been presented has affirmed the Board,¹ including the *Hamilton Brown* case decided by the Eighth Circuit on May 29, 1939. And petitioners can scarcely assert the contrary. They have stipulated that, by identical conduct in behalf of the Welfare Association (R. 673-678), the company destroyed its employees' freedom of choice and thereby violated both Sections 8 (1) and (2) of the Act (R. 728-729; stip., par. 1). Petitioners have stipulated more; they agree that "all evidence, facts, inferences, and matters [stipulated] are agreed to be established in reference to all issues * * *, including * * * in particular, the issue whether the Board correctly found that the Serrick Corporation illegally exerted coercion against the [Automobile Workers] and in favor of the * * * Machinists on the toolroom employees" (R. 729; stip., par. 3).

The company's illegal assistance being thus established, what was its legal effect upon the issues raised by petitioners?

First, that assistance invalidated the closed-shop contract, as Section 8 (3) expressly provides (Main Brief, pp. 10, 30, 32-37),

¹ See cases cited, Main Brief, p. 30.

as the *Hamilton Brown* case holds, and as the Seventh Circuit pointed out in the *Jefferson Electric* case.²

Second, the company's illegal assistance to the organization of a Machinists lodge for the toolroom employees, and the coercive effect of that assistance in influencing the toolroom employees to designate that union as their bargaining representative and to force them not to select the Automobile Workers union, operated to prevent a holding that the toolroom was *then* an appropriate bargaining unit.

To understand this result, it must be made perfectly clear to the Court that there is no substantial reason to determine in any case whether a craft or department should be excluded from a larger unit requested by a majority of all the employees, unless, in addition to proof of physical differences in function, type of work, etc., there is also reliable evidence of substantial sentiment among the employees of the smaller craft or department to have collective bargaining on that smaller basis. Otherwise, there is no basis for not giving effect to the desire of a majority of all the employees to bargain through a more inclusive unit.³ The Board's consistent policy in these cases proceeds upon the eminently sound basis that the desires of the employees, as actually manifested in their free self-organization, are of very great importance as to the form the bargaining unit shall take.⁴ Hence, there would have been no occasion to determine in this case whether the toolroom was an appropriate unit—so that the plant unit, including the toolroom was not—had it not been that various of the toolroom employees belonged to an organization seeking to bargain only for the toolroom, and thereby, without more, appeared to have expressed a desire for a smaller bargaining unit as opposed to the larger unit desired by the majority of all employees

² For the purposes of the validity of a closed-shop contract under Section 8 (3), it is immaterial whether the assisted labor organization is an independent organization as here and in the *Jefferson Electric* case, or a company-dominated one as in the *Hamilton Brown* case. Both are labor organizations as defined in the Act (Section 2 (5)), and neither may be assisted by any unfair labor practice prior to the making of a closed-shop contract.

³ For this reason, there was no occasion to determine whether the Stenotype Department, for example, should be separated from the plant unit requested.

⁴ Third Annual Report of the National Labor Relations Board, pp. 163-166.

in the plant, including 22 toolroom employees (Main Brief, footnote 15, p. 42).

But the evidence showed that membership in the Machinists' toolroom lodge could not be accepted as a manifestation of a free, uncoerced desire to have the toolroom as a separate unit. On the contrary, that membership had been obtained by methods which constituted interference, restraint, and coercion (*supra*, p. 2), and hence by operation of law as declared by Congress in the Act, interfered with, influenced, and destroyed freedom of choice among the toolroom employees. It was upon this manifestly sound basis, founded in the cardinal principles and policies of the Act, that the Board held, in the passage in its decision which occasioned considerable discussion at the oral argument, that (R. 689):

"While ordinarily we have regarded as controlling the free choice of a majority of the employees in a well-defined craft as to the form of organization they desire, in the present case the respondent's [company's] conduct in influencing such choice precludes the application of this doctrine in the determination of the appropriate unit or units."

Certainly this judgment of the Board was not only not arbitrary—it was compelled by the Act if the company did commit unfair labor practices in assisting the Machinists' organization. For the Board to have denominated the toolroom as an appropriate unit when that unit was the forced choice of the employer and not the free choice of the toolroom men would have been to ignore the unfair labor practices and to contravene the basic policies of the Act. The desires of employees are not evidenced by membership in a union unless that membership is a free choice, absent here.

Petitioners ask this Court to do what the Board thus could not do, that is, designate as appropriate the unit which the employer insisted upon and which it exerted illegal pressure to obtain. The argument is, in brief, that once a labor organization, pursuant to the employer's suggestion, appears upon the scene, and thereafter cooperates to secure and willingly accepts the assistance which the employer's illegal interference and coercion were designed to afford and did afford it, the employer's choice of the unit must

nevertheless be determinative. To discount it, petitioners say, is to "punish" the labor organization which the employer favored.

This claim ignores completely the Act's clear mandate, and controlling decisions enforcing it, that employers may not interfere with employee freedom of choice and that the results of any such interference may not be given effect. A labor organization found to be company-dominated may not retain the coveted right to recognition conferred by the employer, even though a cease and desist order will prevent the illegal domination in the future. The recognition illegally conferred must, in addition, be affirmatively withdrawn, in order to establish full freedom of choice. *National Labor Relations Board v. Pennsylvania Greyhound Lines*, 303 U. S. 261; *National Labor Relations Board v. Pacific Greyhound Lines*, 303 U. S. 272. The same principle applies where the unfair labor practices, such as here established, if not denied effect, will secure the employer in the very position which he sought to obtain, and obtained, by his illegal acts. To speak of "punitive" measures here is as beside the point as the argument strongly urged but rejected by the Supreme Court in the *Greyhound* cases, namely, that the disestablishment order was based upon malice toward the company union rather than the necessity of preventing and remedying interference with freedom of choice.⁵ The Board could not permit the company to recognize the toolroom as the free choice of the employees concerning the unit, any more than it could permit the company to continue to recognize the dominated and assisted Welfare Association as a collective bargaining agency.

Nor was it possible to discover what the free choice of the ~~tool-~~ ^{to} room would have been had their choice not been coerced. It would have been both meaningless and impossible to take evidence in 1938 or now, whether by a poll among the employees or by other proof, since the question before the Board was what unit was appropriate in 1937. Petitioners cannot assert that, if freedom of choice was destroyed among the toolroom employees in 1937, the employer's actions prevented inclusion of those employees in *any* unit in 1937. As we have seen (*supra*, p. 5), peti-

⁵ See, Brief for Pennsylvania Greyhound Lines, Respondent, No. 413, Oct. Term, 1937, pp. 16-18, 22-23.

tioners rely upon a doctrine which denies effect to the free choice of the plant unit by a majority of *all* the employees in the plant, only where the conflicting choice of the employees in the craft sought to be set apart is their free choice.

The Board, therefore, did what the Act required. It designated as appropriate a unit desired by a majority of *all* the employees in the plant, as shown by the Automobile Workers' conceded majority. This determination was entirely reasonable. Since, therefore, the plant unit, including the toolroom, was validly found to be the appropriate bargaining unit at the time the closed-shop contract was made and the refusals to bargain occurred in 1937, the contract was invalid upon this second alternative ground, and the company's refusals to bargain violated Section 8 (5).⁶

Finally, insofar as petitioners seek to prove a change of representation, as distinguished from their efforts to set aside a valid order, they are and for long have been completely free to institute appropriate proceedings for certification by the Board under Section 9 of the Act. In that proceeding they may allege any unit as appropriate, toolroom or plant. Their certification by the Board in either unit after the statutory procedure has been pursued would supersede the present order of the Board accordingly. A bargaining order of the Board, like an enforcement decree of a court, is subject always to the undoubted right of employees freely to change their bargaining representatives, as the Board's order setting aside the toolroom contract clearly contemplated (R. 699). The Act remains open for that purpose. But if the order is to be denied enforcement in each case upon the mere assertion that the representative to which bargaining rights were illegally denied has lost its majority, the statute is rendered unworkable. That result cannot be reached if the Act is interpreted so as to secure its

⁶ In *N. L. R. B. v. National Motor Bearing Co.*, decided by the Ninth Circuit on June 1, 1939, that Court affirmed an order of the Board setting aside a closed-shop contract made by the employer and the Machinists union at a time when the Machinists did not and the Automobile Workers Union did represent a majority of the employees in the unit (Section 8 (3)). The Court did not accept, nor does its opinion mention, the Machinists' claim in that case that in any event the Board should merely have set aside the closed-shop provision, a claim the Machinists also make in this case. Copies of the opinion in the case are being furnished separately to the Court.

"plainly indicated objects" of enforcement. *U. S. v. Morgan* (U. S. Sup. Ct.), decided May 15, 1939.

Respectfully submitted.

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JUNE 1939.

IN THE
**United States Court of Appeals for the
District of Columbia**

APRIL TERM, 1938

SPECIAL CALENDAR.

APR 19 1938
Joseph A. Padway

**INTERNATIONAL ASSOCIATION OF MACHINISTS,
TOOL AND DIE MAKERS LODGE NO. 35, ET AL.,
PETITIONERS,**

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENTS.

**PETITION TO REVIEW AND SET ASIDE ORDER OF NATIONAL LABOR
RELATION BOARD.**

PETITIONERS' REPLY MEMORANDUM.

**JOSEPH A. PADWAY,
HERBERT S. THATCHER,**
Attorneys for Petitioners.

IN THE
**United States Court of Appeals for the
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PETITION TO REVIEW AND SET ASIDE ORDER OF NATIONAL LABOR
RELATION BOARD.

**MEMORANDUM IN REPLY TO RESPONDENT'S SUP-
PLEMENTAL MEMORANDUM.**

It is not our desire to further burden the Court with additional argument, but the filing by Respondent of a supplemental memorandum, which misconstrues certain facts and which raises new issues, compels the submission of this reply memorandum. The writer of this brief apologizes for the delay in filing this brief and can only state that the pres-

sure of out of town business made it impossible for him to sooner make answer.

The Board in its supplemental memorandum repeatedly refers, as being decisive of the question of employer assistance to the American Federation of Labor, to acts of discrimination and interference on the part of the employer which occurred for the most part several months prior to the time that the American Federation of Labor had any contact either in the plant or with the employees of the Serrick Company. The Board stresses that petitioners have stipulated as to these acts. We have so stipulated only because we are in no manner concerned with these prior activities of the employer, and regardless of whether those findings are or are not supported by the evidence it is not for us to take exception to them. In an effort to avoid the excessive costs of printing hundreds of additional pages of testimony we have stipulated concerning matters in which the American Federation of Labor was in no way involved, and which have no proper relevancy to any of the issues raised by petitioners. The Board has seized upon these so-called "admissions" to infer that by stipulating as to prior acts of interference with organizational activities of the CIO, we have likewise stipulated as to encouragement of the American Federation of Labor. Obviously this is not true. Petitioners have stipulated only as to prior acts with which they were in no manner concerned and over which they had no control.

In addition to drawing unfair inferences from the stipulation, the Board has pronounced a doctrine in respect to the prior unfair practices of an employer so arbitrary as to require but its mere statement to convince of its arbitrariness. The Board states that in a case where two rival labor organizations are competing in a general industrial field, any attempt on the part of an employer in a particular plant

in that field to interfere with the organizational activities of one organization operates as a matter of law to encourage and assist the other organization, even though the other was not present or actively competing with the complaining organization in the particular plant either at the time of the interfering activities or for months subsequent to that time. Such employer activity, the Board states, operates to bar the union not discriminated against from organizing in that plant for an indefinitely extended period.

Such a doctrine is not only manifestly unfair and arbitrary; it is contrary to specific provisions of the National Labor Relations Act guaranteeing to employees the right to engage in concerted activities for the purpose of collective bargaining, and to form, join or assist labor organizations. This issue, for the first time presented in the courts, is fundamental and important. Basic rights of labor organizations are involved. Are such organizations to be deprived of their right to organize and the benefits thereof because of the previous existence of an employer's unfair activities over which the organization has no control and which were in no way prompted or supported by it? Common sense requires a negative answer.

Certainly the Board finds no precedent in ordinary legal concepts for this extraordinary rule. Ordinarily it would be supposed that before such activities can be said to both discourage one organization and encourage another, something approaching if not a specific, at least a general intent on the part of the employer to encourage that other organization must exist, if not a knowing participation by the encouraged union in the activities. Under the circumstances of the present case where at the time of the alleged unfair acts the employer had absolutely no knowledge of even a desire on the part of the A. F. of L. to organize its plant, it is impossible to find even a constructive intent.

The Board argues that discouragement of one of two rival organizations must necessarily encourage another. Regardless of whether this assumption is sound in a situation where two rival organizations are contending for membership at the same time, or where it was known and contemplated by the employer that organization by a rival union would follow shortly after its unfair practices, surely no basis exists for such a presumption or conjecture when a space of time separates organizational attempts by the rival unions and when there is no evidence of knowledge on the part of the employer of the desires of a rival union to organize its employees. Indeed in the present case the inference from the evidence is quite to the contrary, for here it was directly testified that a company union had first been formed to defeat all unionization.

It is only that conduct of the employer which occurs subsequent to the time that an employer knows or expects the presence of a rival organization in the plant with which the Board should concern itself. The first appearance of the I. A. M. at the plant, either known or expected by the employer, was on the evening of July 28, when 34 employees voluntarily joined that organization. There ensued no conduct of the employer which in any way operated to assist the American Federation of Labor or coerce its employees to join, as we have demonstrated in our principal brief.

The American Federation of Labor is not to be held in any manner accountable for any of the thoughts, wishes, hopes, or machinations on the part of an employer, to which the American Federation of Labor was not a conscious party, so as to militate against the right of the American Federation of Labor to organize the employees of that plant.

This in effect is the holding of the Supreme Court of the United States in *Consolidated Edison Company of New York, et al. v. National Labor Relations Board*, 59 Sup. Ct. 206, where the Court states:

“The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining. Under Section 7 the employees of the companies are entitled to self-organization, to join labor organizations and to bargain collectively through representatives of their own choosing. The 80 per cent of the employees who were members of the Brotherhood and its locals, had that right. They had the right to choose the Brotherhood as their representative for collective bargaining and to have contracts made as the result of that bargaining. *Nothing that the employers had done deprived them of that right.* * * *”

In its letter to the Judges of the Court of Appeals dated June 12, 1939, the Board cites the case of Swift and Company as being particularly in point. The Swift Case differs from the present one as much as it is possible for two unfair practice cases to differ. In that case there were scores of instances of active interference, threats, and intimidation by *actual* supervisory employees, such as assistant superintendents and foremen, none of whom were members of either of the rival organizations. The activities of these supervisors were clearly on behalf of the employer.

If we assume as true that the International Association of Machinists (A. F. of L.) had been assisted by the employer, the Board argues that such assistance affects free choice, and therefore compels the Board to certify the industrial unit and to destroy the craft unit. Free choice of the employees having been tainted, the Board chooses the unit for them. But if that is done, what happens to the so highly regarded “desire” of the employees which the Board states is the most important single consideration in determining a unit; and what becomes of that freedom of choice which the Board is so zealous to protect, and which the Act guarantees? Analyzed, what the Board is saying is this: “Because the employer has urged his em-

ployees to belong to a particular craft¹ thus affecting their choice, it follows that such employees really do not desire that unit but rather desire another unit—and so we shall give them an industrial unit. From the finding of interference with *freedom* of choice the Board jumps to a conclusion of *expression* of choice. The conclusion finds no basis in anything but the most tenuous and unsupportable kind of conjecture. No effort is made to ascertain the actual choice of the employees as to the bargaining unit and the real desires of the employees are entirely disregarded. The only possible explanation for the reasoning adopted by the Board in the present case is that the Board desires to punish the employer by seeing to it that his favored unit is not obtained regardless of the wishes of those constituting the unit. This approach is not only arbitrary but contravenes the act itself. The only possible method of approach, in a case where actual unfair practices exist, is that suggested in our principal brief—ordering the employer to cease and desist from his activities and permitting the employees to express their desire by voting when it is felt that the employer influence has abated. This is the method customarily adopted by the Board in other unfair practice cases and it has given no reason why it should not be adopted here.

Petitioners do not ask, as Respondent states in its brief, that either this Court or the Board designate as appropriate the unit for which the employer has exerted illegal pressure. We claim that no such illegal pressure was exerted, but even assuming it was we merely ask that the Board

¹ In the present case the employer did not favor and is not charged with favoring any particular craft, or type of unit; his preference was alleged to be solely toward a particular union. There is absolutely nothing in the record to show that the employer in any way urged his employees to choose a craft unit rather than an industrial one. The rule contended for by the Board certainly can have no application unless it is at least shown that the employer had been attempting to influence his employees as to the *type of bargaining unit* they should select.

refrain from designating any unit until the actual wish of the employees can be ascertained. That method certainly is the only one which takes into account the real desires of the employees, which as the Board states, is the ultimate determining factor. It is as arbitrary and unfair for the Board to select a unit without making any effort to find out what the real desire of the employees is, as it is for the employer to choose the unit. Indeed it is possibly even more arbitrary to do as the Board has done in the present case, for here there is at least a prima facie indication that the employees desire a craft unit. It should be remembered that 34 tool room employees voluntarily signed Machinists membership blanks prior to the time that the employer had any indication that the American Federation of Labor was going to compete with the CIO in the organization of the plant. Is the free choice of these craftsmen to be completely disregarded?

In the case of *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, et al., vs. Nashville, C. & St. L. Ry. Co.*, 94 Fed. (2d) 97, 99, the Court said:

“It may be deduced from this that there is no contention that the Board may of its own motion establish crafts or classes by arbitrary rulings as to grouping, or that the Board is authorized by the statute to ignore historical development, the wishes of the employees, or other factors material to a determination of the existence and scope of existing craft or class groups. * * *”

We have already written the Court a letter on the recent decision of the United States Supreme Court of Appeals for the Second Circuit in the Case of *N. L. R. B. vs. National Licorice Company*, in which Judge Learned Hand held that where a long period of time elapsed between the hearing on the case and the final decision and it is claimed that there has been a shift in affiliation, that an election must be held

to determine this. We again state, for the convenience of the Court, this portion of the decision:

"This leaves only paragraphs 1(d), 1(e), II(c), II(d), and II(e), of the order. Paragraphs I(e), II(d), and II(e) we will not disturb, but I(d) and II(c) seem to us to require some modification. The finding of the Board that the union represented the respondent's workmen, necessarily relates to July, 1937; at which time, the union had only just organized the shop. The strike followed in two weeks and failed, and then came the company union; we know nothing more. It is now nearly two years after the tentative organization of the factory, for it was really only tentative, the applicants not having yet been accepted; and our order will be conditional upon the Board's ascertaining by a new election whether the union is now the choice of the majority; otherwise there is some chance that it may not represent their present wishes. In *National Labor Relations Board v. Remington Rand, Inc.*, 94 Fed (2) 862, 869, (C. C. A. 2), we held that the "Joint Board" had a continued presumptive authority which the employer must overcome by evidence, but in that case the union had been established for a year before the trouble arose. Here there is no ground for such a presumption. Moreover, the workmen are few, and an election will not be an onerous condition."

Respectfully submitted,

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Dated at Washington, D. C., July 17, 1939.

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